Speech Discours

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

S-80-3

REMARKS MADE

BY

THE HONOURABLE ANDRÉ OUELLET

MINISTER OF CONSUMER AND CORPORATE AFFAIRS CANADA

CONCERNING REFORM OF COMPETITION POLICY

TO THE

FEDERAL-PROVINCIAL CONFERENCE OF

CONSUMER AND CORPORATE AFFAIRS MINISTERS

SASKATOON, OCTOBER 8-10, 1980

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Competition policy in Canada as expressed in the Combines Investigation Act has been under review for approximately 15 years now. This reform started in 1966 when the Government of the day asked the Economic Council of Canada to prepare a study on competition policy in Canada. The Economic Council's report was published in 1969 and on the whole it recommended a strong competition policy to maximize the dynamic forces of the marketplace. The Council felt that free competition was the optimal economic choice as it was most beneficial to Canadians. The report also recommended that civil procedures (or administrative) should be employed rather than criminal sanctions, to ensure that the law be flexible and well suited to the economic conditions in Canada.

Following the Economic Council's report, the then Minister of Consumer and Corporate Affairs, Ron Basford, introduced Bill C-256 into the House of Commons. This document was intended above all to be a working document to elicit a national debate on the subject of competition policy. To say that a national debate then ensued would be to understate the case. The confrontations were so

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direct that the Government was obliged to proceed with only a portion of the amendments contained in Bill C-256 and thus left certain subjects for further consideration.

That policy finally bore fruit and I was privileged to be the Minister of Consumer and Corporate Affairs when the first stage of amendments was adopted by Parliament. The following were the principal features of the amendments of 1976:

1. They extended the Combines Investigation Act to include services.
2. Civil procedures were established which empowered the Restrictive Trade Practices Commission to issue remedial orders where serious anti-competitive effects are found. The matters include refusal to sell, tied selling, market restrictions, etc.
3. The misleading advertising provisions were strengthened and clarified, and extended that part of the Act to misleading representations of all kinds. Also, they created new prohibitions of a number of unfair or dishonest selling practices. These relate to warranties, testimonials, so-called double ticketing of goods, pyramid selling, bait and switch selling, selling at higher than advertised price, and promotional contests.

4. The prohibition of collusive arrangements, such as price fixing, was strengthened, and bid rigging was prohibited.
5. The Director of Investigation and Research, who was charged with the enforcement of the Combines Investigation Act, was empowered to appear before federal regulatory bodies in order to promote competition.
6. Provision was also made for civil suits to recover loss or damage resulting from conduct contrary to the Act.

While these amendments were certainly important, they were only a first step, and if you will allow me to use an analogy, competition policy in Canada was handicapped because it had not been entirely completed. The judicial disappointments of the last few years are dramatic proof of the failings of the present legislation and of the need to amend it.

With respect to collusive arrangements, two recent decisions have completely upset the traditional application of the provisions of the legislation by ruling that a conspiracy was not criminal if it did not have as its object the complete elimination of competition in a given market. I am referring of course to the Aetna decision which the Crown lost in 1977 and, more recently, the Atlantic Sugar case last summer, where the sugar companies were found not guilty by the Supreme Court of Canada.

With respect to the merger provisions, they are "completely inadequate." The Supreme Court of Canada decision in the K.C. Irving case, 1976, has dampened our hopes that the existing provisions might be effective. The K.C. Irving company had acquired total control of all the English language newspapers in New Brunswick and we were concerned about the repercussions which this monopoly might have on the public interest. Not only, however, did the K.C. Irving interests completely dominate the newspaper business but they were a major factor in radio and television, thus achieving still greater control over the means of communication in the province. Moreover, the K.C. Irving interests were by far the most important industrial organization in the province, dominating the petroleum industry, the pulp and paper industry and the trucking industry, with all that this implies, given their dominance of the media, about the concentration of power in a democratic society.

The company was acquitted on charges of illegal mergers and monopolization. The Court ruled that the simple creation of a monopoly was not in itself illegal and that the Crown had to prove beyond a reasonable doubt that competition had been reduced to the detriment of public interest.

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Since this judgement the flood of mergers has not ceased to make dramatic changes in the industrial structure of the country. Although most mergers do not give rise to serious concerns from the standpoint of public policy, some produce grave disquiet among persons who take the trouble to see what is happening.

Just to take one example, in a country where the department store chains dominate their sector of the retail trade, and where the number of chains into whose hands such market power has fallen is already limited, it is a cause for worry about the direction in which our society is heading, when we see concentration in this sector greatly increased by the merger of the controlling interests in the Hudson's Bay Company, Simpsons and Zellers.

Similarly it is a matter for profound concern that the already highly concentrated newspaper business in Canada should be concentrated still further through the acquisition by the Thomson interests of F.P. Publications.

One is forced to ask what could possibly be next, when these two concentrated sectors are linked through the acquisition of the Hudson's Bay Company by the Thomson interests.

I must therefore caution you that the wave of mergers has such a considerable impact on the Canadian industrial structure that if it is not controlled, its negative effects on competition will ultimately annihilate the effort of the Government to promote competition.

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In a democratic society like Canada, the economy must reflect the interests of the population and of the principal groups which compose the country. The Combines Investigation Act reflects a choice, that of decentralized decision-making by the private sector as a means of distributing the economic resources of the country. The absence of adequate legislation to promote competition, especially in the area of mergers, promotes concentration of power within a relatively small number of companies. The very basis of competition as well as the benefits which are derived therefrom are thus in danger.

Free competition over a long period of time ensures that retail prices for goods and services will be lower, that the consumer will have a better choice. This free competition will further ensure a spirit of corporate initiative as well as efficient allocation of resources within the Canadian economy. It is these advantages of competition that are undermined by the concentration of economic power.

In passing let me make the plea that you give consideration to an initiative in your own jurisdiction which could make an important contribution here - what I have in mind is that the efficient performance of many

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markets could be improved significantly, if you were to seek consumer representation on every marketing board which operates within your province.

The absence of effective competition legislation has undesirable consequences at the socio-political level. Companies become larger and larger and fewer and fewer as a result of an increase in concentration. Because of their importance in the marketplace, they obtain more power in society. Thus the risks that a community of interests develops between the companies themselves and the Governments become more and more present.

The essence of a free society is choice; the greater the increase in concentration, the greater the restraints on choice. Consumers' choice of goods and available services becomes limited, employees are restricted in their choice of employers, suppliers find a restricted number of purchasers, especially with respect to industrial merchandise.

In my opinion, Canada has arrived at a critical point in its economic, political and social evolution. It is time to ask oneself seriously about the type of economic system which we desire if we do not want to find ourselves before a fait accompli and impotent to remedy the situation.

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It is against this background that I intend to urge upon my colleagues in the Government, the inescapable need for early and major changes in the three most important provisions of the Combines Investigation Act, i.e. those dealing with conspiracy, merger and monopoly. On conspiracy, I think there is very little difference of opinion in the country. There is nothing to be said in favour of price-fixing, or collective boycotts, or agreements to divide up the market. I intend to seek legislation which will bring an end to these practices by outlawing them in unequivocal terms. This does not mean however that in appropriate circumstances and with carefully designed controls, we cannot have specialization agreements for limited terms where the need for such exemption from the general prohibition can be demonstrated.

Cartelization of the economy however can come about through means other than conspiracy. At least the effects can be the same, where we permit excessive concentration to develop. This is why we urgently need an effective policy on mergers. During the long debates that followed Bill C-256, a provision requiring mandatory registration of mergers has been dropped. I think this was a mistake. Some recent business operations, particularly the merger

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of the Bay-Simpsons and the reciprocal actions of Thomson and Southam involving the transfer of assets and the closures of newspapers, demonstrate that an advance notification procedure is absolutely vital to enable the Government to intervene before it is too late when the public interest is concerned.

It is obvious that not all mergers and acquisitions will necessitate scrutiny and the advance notice procedure will have to be designed accordingly. However, I think that the principle of an advance notice is of prime importance. Where a merger will create excessive concentration in any industry, or where an industry is already highly concentrated and the acquisition of smaller firms is likely to entrench the position of the dominant firms, we must be in a position to block the consummation of such mergers. In these circumstances it is manifest that the blunt prohibitions of criminal law are inappropriate. What is needed is a careful analysis of the relevant factors and a decision based on a skillful weighing of the several factors involved.

In my view, similar considerations arise when we come to examine monopolization, or as it is sometimes called, abuse of a dominant position. Certain trade practices which are quite innocent when engaged in by a company with little

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or no market power, can become quite devastating when engaged in by a monopolist. But monopoly power or dominance is a matter of degree.

Obviously, these issues are complex. Unfortunately, we must accept the evidence that the legislation contains so many nuances that it loses its effectiveness. I am thus determined to propose amendments which, I hope, will be reasonably easy to understand and, above all, which will be effective.

I am fully aware of the difficulties and controversies raised in the past by similar amendments. However, I believe they are necessary because they will benefit all Canadians and particularly consumers. When there is effective competition in the marketplace, it is the consumer who ultimately benefits; prices are lower and the range of goods offered is much larger, quality of goods and services is also improved, etc. That is why I seek your support as representatives of the consumer during this legislative revision.

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Speech Discours

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

S-81-22

NOTES FOR REMARKS

BY

GEORGE POST

DEPUTY MINISTER OF

CONSUMER AND CORPORATE AFFAIRS CANADA

TO

THE CANADIAN CHEMICAL PRODUCERS' ASSOCIATION

OTTAWA, NOVEMBER 19, 1981

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Ladies and Gentlemen

I would first of all like to say that it's a pleasure for me to have this opportunity to speak to you here today.

I'm sure that both as members of the Canadian Chemical Producers' Association, and as businessmen, one of the things uppermost in your minds at the moment is the economy.

In one of the budget papers tabled last Thursday entitled "Economic Development in Canada in the 1980s," it was stated, and I quote: "The Government of Canada believes that it is vitally important that business and labour understand the Government's position with respect to economic development policies."

I would like to take the next few minutes to try and increase your understanding of Consumer and Corporate Affairs Canada and the very important role it plays in the way the market system works in this country.

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Frankly, I find that the department is not well known, or that what is known about it is coloured by misconceptions. I am reminded here of the aphorism attributed to Will Rogers: "The trouble with most people isn't what they don't know; it's what they do know that ain't so."

I think part of the problem may be that the department is not well named. The name suggests conflict, and to some people, even confrontation. How can a federal department pretend to represent the views of consumers and business at the same time? is the question most often posed by critics of the department.

We might be better understood if we were to call ourselves the federal department of the marketplace. In a nutshell, our mission is to use the powers of government to maintain a healthy, efficient and fair market system across Canada. And in the process, to ensure that the interests of producers and consumers are represented and balanced in accordance with government priorities.

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Just to give you an idea of how broad our involvement is, the department is responsible for implementing, in whole or in part, no less than 35 acts of Parliament. These laws require us to ensure that products on the market are safe, that they meet acceptable standards, and that they are packaged and labelled honestly and accurately. They cover an almost endless variety of items -- precious metals, textiles, toys, cribs, grain elevator scales, electricity and gas meters, and the list goes on.

The department has three operating divisions or bureaus which run over a dozen separate programs. These include such diverse elements as bankruptcy, patents and copyright, weights and measures, packaging and labelling, misleading advertising and the control of hazardous products. All of these programs have a common theme: each and every one of them represents an attempt to use the legislative and regulatory powers of government to create a framework within which the private market system will work effectively.

Now I know this must sound like a lot of regulation, especially to businessmen like yourselves.

Still, it cannot be disputed that our economy is a complex system, and a framework of institutions, rules and safeguards will continue to be necessary -- although we would all like to see the regulatory system rationalized and simplified.

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Going back to the budget publication I cited a moment ago, it is recognized that "we must carefully examine our regulatory systems to ensure that the rules are clear and the procedures efficient, so that they guide business enterprise rather than inhibit it. We must also ensure that our laws which govern mergers, investment, competition and commerce are in tune with modern business practice so that they facilitate economic expansion rather than burden initiative."

Later on in the budget document one of the principal themes in support of the economic development process in the 80s is stated, and I quote again: "The Government will emphasize policies and programs whose objectives are to strengthen the performance of markets and their ability to adapt to change, notably in the areas of industrial innovation and restructuring, manpower policy, regulatory policy and competition policy."

Now, achieving reform is not easy, as every Ottawa watcher knows. It's not just that we operate within a federal system -- although that does tend to create problems.

There is also the fact that much market regulation is quite technical and of interest to only a limited number of experts. It is difficult, for example, to secure amendments to the Bankruptcy Act or the Non-Profit Corporations Act in our Parliamentary system, which thrives on conflict and debate and not on technical details.

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In other areas we are involved in revising policies that are both technical and controversial. The best example is the Patent Act, which is technical and of direct interest only to a specialized audience, although its effects on invention and innovation are felt throughout the whole economy.

As I'm sure most of you are aware, we have been working to recast our patent legislation to reflect the more modern times in which we live. The Patent Act last underwent a thorough revision in 1935. It goes without saying, of course, that things have changed considerably since that time. There have been three major studies of the patent system and from these, a series of proposals for changes to the Act has been developed.

One of the major themes in the proposals discussed to date is called "conformity." What we are proposing to do is conform the Canadian law to the European Patent Convention that governs the operation of the European Patent systems. This will cut costs for applicants and increase office efficiency through greater use of foreign examination results.

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We call our second major theme the "local working incentive." We argue that patent protection can be more actively used to support the government's economic development objectives. The basic patent term would be 14 years from the date of application in Canada and would be extended for a further six years if the invention is being worked in Canada by the end of the 14th year. In the case of pharmaceutical inventions and agricultural chemical inventions, patents would qualify for extensions if they are worked locally <u>or</u> the pharmaceutical or chemical has been approved for use and was actually in use in Canadian medicine or agriculture by the end of the 14th year.

Finally, we propose to collect data on the operation of the system so that it can be more fully assessed in future years. This would be coupled with a system of periodic renewal fees to be collected from patentees who wish to keep their patents in force.

I think I should emphasize here that I give patent law revision high priority, although it is impossible at this point to predict a date of introduction. When the bill is introduced, there will be opportunities for interested parties to familiarize themselves with the proposals and to make submissions.

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Some of the most complex problems in my department do not, however, arise with new laws but rather with new products. Sometimes the problems only start after the patent has been granted and the development work has been completed. Unfortunately some of these troublesome complex new products come from the chemical industry. This is an area where improved communications and consultation between industry and government would be most welcome.

Let me take as an example the recent problems which have arisen with urea formaldehyde foam insulation. I know that my colleague, Jim Black, has already spoken to you this morning about product stewardship and I don't want to repeat his message. But I think we have here a lesson about risks we should avoid in the future. In the case of this one product, I think that the system of research, development, marketing and quality control broke down. A large number of Canadians are now worried and angry about the impact the product has had on their health and the value of their homes. The images of governments and businesses have been tarnished, and I for one would not want to see a repetition of this.

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It is possible that if there had been more co-operation between government and industry, the problems associated with the insulation could have been avoided and the urea formaldehyde foam story would not have turned into a nightmare. I am thinking particularly of better quality controls, more adequate early warning systems, bonding or insurance schemes and more adequate disclosure of risks to customers. If we can learn to work together successfully, I think we can relieve some of the pressure on government to be much stricter in its formulation of rules and regulations governing the marketplace.

When I find myself exhorting an audience this way I am reminded of the old farmer who cut off the young Ag Rep who was exhorting him about how he could increase his output by 10 per cent. "Shucks son," he said, "I already know how to farm at least twice as good as I'm doing."

As important as it is to try to maintain a spirit of co-operation between government and industry, I think I would be safe in predicting that this co-operative effort is going to be tested in the transformation of the Combines Investigation Act into a more workable and effective legal instrument.

For those who believe in the free market, it is generally agreed that competition is an essential ingredient in the achievement of an economy characterized by efficiency, dynamic change and fairness. By ensuring the continuance of truly competitive markets, the government -- directly or indirectly -- puts pressure on businesses to be both efficient and innovative.

Perhaps one of the most important reasons for government involvement in the maintenance of a competitive market system is to protect individuals and businesses wanting to compete free from coercion by their more powerful rivals.

For true competition to exist, governments must protect the free market forces by establishing the rules of the game in which the interests of business -- essential to economic growth -- and those of the general public will be safeguarded.

The Combines Investigation Act is a long-standing piece of legislation which has been recognized to have some serious weaknesses. I don't think it necessary to recount to you the litany of judicial failures that have occurred whenever the government has tried to deal with unfair business practices by means of an antiquated law.
There has been controversy surrounding amendments to this piece of law for at least a decade. But of course the rhetoric has not always helped to clarify the real issues.

The historical position of Canadian governments concerning the structure and behaviour of industry has in fact been rather pragmatic. In some instances Ministers have opted for marketing boards and a regulated framework for certain industries -- in agriculture, for example.

In other cases, they have chosen direct involvement through partnership, ownership or "chosen instrument" firms -- the best known example here of course is the energy sector. And then there are those sectors of economic activity which government has decided to treat as public utilities, notably electricity generation, satellite communications and the Post Office. Finally, there are those areas which the government has left to the market, subject only to rules such as those of the Combines Investigation Act. Hardly a fanatical quest for ideological purity, which we are sometimes accused of.

In my opinion, a great deal of the controversy about the need to amend the Combines Act and the nature of the required amendments hinges on alternative possible conceptual models of corporate behaviour and the role of business firms that are in circulation. I believe that many corporate executives and their strategic advisors foresee increased international competition and a growth in the power of multinational firms. For them, the preferred Canadian response should be to encourage bigness and the formation of a limited number of large Canadian firms with multinational dimensions, around which Canadian industrial survival and growth can be orchestrated. This is one conceptual model, which I like to call the "World League" model, the implication being that the rules should be set to make "our team" as strong as possible whatever the cost, and that the only performance that really matters is performance "out there" in world markets.

The alternative strategy is based on the assumption that multinationals adapt and conform to the competitive circumstances of the various markets in which they operate and recalls that there are many Canadian firms and professions that are not in fact subject to direct international competition. This other conceptual model is one which I would call the "Domestic League" model. It assumes that the performance of corporations that really matters to Canadians is what happens in Canada.

Of course, the reality of the business world that we have is a mix of these two models. But I think illustrating them in this oversimplified way may help to explain the conflict and confusion that seems to reign in the rhetoric about combines rules.

It is my Minister's contention that we need to recognize that both these models have relevance for Canada. Given the nature and distribution of economic activity in Canada, we need a set of distinctively Canadian rules to ensure that as Canadians we get the benefits of free competitive markets domestically while at the same time having enough size and vitality to compete internationally. In a large number of industries the performance of Canadian business could be substantially improved if businessmen could themselves be convinced to accept an increased degree of competition -- in terms of the number of independent firms in existence, and in terms of ruling out of order certain types of bullying behaviour which is intended to coerce competitors, suppliers and customers.

The domestic advantages we seek are pressures to reduce costs, rapid growth in interesting jobs and increases in the value added to our Canadian resource exports.

In closing I should note that whenever the topic of competition policy comes up for discussion, the impression is often created that measures aimed at combatting a wide variety of practices designed to reduce competition are intended to benefit consumers at the expense of Canadian businesses. Nothing could be further from the truth.

Certainly all Canadians are consumers and will be the ultimate beneficiaries of any measures that are effective in improving the performance of the production, distribution and marketing processes in our economy.

But the fact is that the vast majority of Canadian enterprises has an even more immediate, direct and compelling interest in the maintenance of a competitive system. That is undoubtedly the case with respect to the small- and medium-sized Canadian firms, most of which already operate in a highly competitive environment. It also holds true for the many Canadian companies that find themselves facing stiff competition from foreign companies in markets at home and abroad. Those firms will benefit from more efficient production of the goods and services they buy from others.

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I am sure that the members of this Association are seriously concerned about the adverse impact of growing concentration and the exercise of excessive market powers on their operations. As my Minister has emphasized on various occasions, most Canadian businesses -- as well as all Canadian consumers -- have a strong and compelling interest in the establishment of a fair and effective competition policy in Canada.

It is Mr. Ouellet's belief that events over the past few years have clearly impressed on the public's mind the urgent necessity of undertaking limited reforms of Canadian competition policy so that it can in practice play the role expected of it. It is his intention to introduce a bill proposing amendments to the Combines Investigation Act at the beginning of the next session to cover such areas as mergers, conspiracies and abuses of dominant positions in the belief that over time these measures will lead to a substantial increase in the degree and keeness of competition among Canadian business.

I can only ask in closing that both as members of the Canadian Chemical Producers' Association and as individual businessmen, you read and reflect on the implications of his proposals before you make up your mind about them.

Thank you.

Speech Discours

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S-81-23

NOTES FOR REMARKS

BY

THE HONOURABLE ANDRÉ OUELLET

MINISTER OF CONSUMER AND CORPORATE AFFAIRS CANADA

AT THE

FINANCIAL POST CONFERENCE

TORONTO, NOVEMBER 20, 1981

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Ladies and Gentlemen:

In looking over the agenda for this timely conference on competition policy for Canada, I was reminded of a story I heard some time ago about a consumer trying to understand how the marketplace functions. With Christmas coming and conscious of the importance of getting full value for his dollar, he asks his grocer: "How much is your turkey today?" to which the grocer replies: "A dollar twenty-nine a pound."

"A dollar twenty-nine?" repeats the customer with some surprise. "Why, down the street your competitor is charging 99 cents a pound."

"So why don't you buy it down the street?" retorts the grocer, unimpressed.

"Because he is sold out, and can't get any more from his wholesaler," explains the customer.

"Well," says the grocer with a knowing smile, "when my supplier won't ship to me, and I don't have any turkeys, I charge only twenty-nine cents a pound."

Depending on whether you are a businessman, a bureaucrat or a consumer, your reaction to this story could be quite different.

The businessman might conclude that the story is absolutely impossible because of all the Consumer Affairs inspectors checking everyone.

The bureaucrat might suggest that this is a good example of zero-base budgeting.

On the other hand, a typical consumer might simply shrug his shoulders and say: "That's the way it is now in the marketplace."

I, as Consumer Affairs Minister, and you as representatives of Canadian business, should equally be concerned if this third reaction is heard. For all of us should want a healthy competitive marketplace. And all of us should view with concern the evidence which suggests that Canadians are increasingly unhappy with the degree of corporate concentration in the Canadian economy, and the seeming ability of large and dominant firms to set prices, determine supplies and affect employment opportunities. The message is clear: Canadians want action and they want it soon.

That is why this conference on competition policy organized by the Financial Post is so timely. Last April, I circulated proposals for amending the Combines Investigation Act and asked for reaction via a series of questions. During the summer, I met and consulted with many groups across the country: small businesses, large corporations, multinational companies, provincial politicians and

officials, associations, lawyers, academics and consumers. I welcome the opportunity to include you who are here today in that very successful consultation process. As a result of the comments made so far, the proposals have been modified and improved. They will be incorporated in legislation to be made public at the start of a new session of Parliament, now scheduled for early 1982.

I would like to express my appreciation to those who took part in the consultation process. Their efforts have been productive and they will no doubt recognize their contribution when the legislation is made public. Although there were many who took the time to offer their views and should be commended for their excellent advice, I would like to single out three groups -- The Canadian Bar Association, the Business Council on National Issues, and the Canadian Federation of Independent Business -- for their very constructive and imaginative suggestions. Perhaps I could award them the three stars of the consultation process.

I regret that there was one national association which took a less helpful approach and acted in what I would call a premature and ill-advised manner. I hope that when it sees the legislation, it will recognize that its concern has been to a large extent an over-reaction.

To this association and others, I want to say that modifications to the legislation will be considered at any time, right up to its final passage. But let us hope that any further proposals will enhance the objectives of competition policy and will not be presented in order to delay unduly Parliamentary approval.

In recent months Canadians have had ample evidence to see that the federal government is a flexible and accomodating negotiator. The energy agreements with producing provinces and the Constitutional accord demonstrate a willingness on the part of the national government so seek solutions to thorny problems. They are also proof of the government's determination to act. This same spirit of flexibility will mark my own approach to the task of updating Canada's competition laws. Put simply, as the Minister charged with responsibility for protecting the integrity of the Canadian marketplace, I have a willingness to listen, but an obligation to act.

Earlier, I made reference to the growing number of Canadians who view corporate concentration as a problem which must be addressed by their government. Recent surveys by public and government institutions show that more than three out of every four Canadians believe corporate concentration is an important and growing concern affecting the performance of the Canadian economy. And although a majority of Canadians believes the answer to this problem lies in more and better competition, a sizeable minority would favour increased government regulation as the most appropriate means for protecting them against abuses.

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It is not difficult to find reasons to explain the public's attitude. Attempts to reform competition laws in the past have been largely unsuccessful because of opposition organized by some sectors of the business community. This has led to a feeling that competition reform is not possible and that direct government regulation of business may be a more appropriate response.

In your deliberations here today and in your consideration of the legislation which will be made public soon, I hope you will bear these attitudes in mind.

There is no need for me to repeat the history of past attempts to update competition policy. Nor is there a need to point out that it has now been 12 years since the Economic Council of Canada published its major recommendations on competition. Nor need I remind you that Canada's laws affecting mergers, monopolies and conspiracies have remained virtually unchanged for more than half a century.

What I do want to stress is that there must be an appropriate response to the large and growing number of Canadians who are saying that something must be done to protect competition in the Canadian economy and increase business accountability.

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For this reason I must say that the status quo is not an option to be considered. If there are some who believe that by derailing this attempt to put some order in the Canadian economic environment they can look forward to a period of "business as usual," I suggest they are being shortsighted and working against their own best interests. For if Canadian business fails to show that it is serious about responding to the public's concern, the public will demand far more.

One does not need tarot cards or a crystal ball to see that the only alternative to stronger competition laws is increased demand for government intervention and control. In short, the choice is between competition reform now or increased government regulation later.

I hasten to add that this is not a threat, but a warning. Clearly my preference is for less, not more, government regulation. My job as Minister of Consumer and Corporate Affairs is to ensure that the forces of the marketplace operate with fairness to improve efficiency and to encourage Canadian companies to compete world-wide.

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During your deliberations today, I hope you will approach with a positive spirit the implications for Canadian businesses of reform to our competition laws. To aid you in this task, let me outline briefly some the basic considerations which must be borne in mind.

In seeking to devise an appropriate response to the urgent need for reform of competition policy, the government has been guided by three objectives:

First, to promote efficiency, innovation and productivity in the Canadian economy;

Second, to prevent abuses of market power and by so doing promote fairness to consumers and smaller businesses; and

Third, to ensure markets perform their basic function of allocating resources, thereby reducing the need for direct government regulation.

In your panel discussions today, you will no doubt hear many wide and divergent views about what the proposals mean and what they will do.

I should like to take a few minutes to deal with what I view as some of the myths that surface each time the subject of competition reform is discussed.

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The first and most common myth surely must be the suggestion that the impetus for competition reform comes from ivory-tower bureaucrats or interventionist politicians. In point of fact, every year, hundreds of complaints are received by the Director of Investigation and Research from interested parties making representations in cases where it is believed that competition has been hindered by unfair practices. Many of those complaints can be dispensed with quickly, because under the present law there is little chance of obtaining redress. Interestingly, most of those cases come -- not from consumers -- but from businesses, especially small businesses, concerned about the effects of mergers, monopolies and alleged conspiracies.

A second myth relates to the intention of the proposals. I hear it said, too often, that proposals for competition reform are biased against large companies. In the law which I shall present to Parliament there will be nothing to say a company cannot become big or remain big. There are instances where, because of its relatively small size, the Canadian market will support only one large company or a few large companies. My competition legislation will take into account this unique character of the Canadian economy. But I believe that Canadians want assurance that those in a position of dominance do not abuse their power.

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If a firm occupies a position of dominance because it is efficient, innovative and competitive, it will have nothing to fear.

If, on the other hand, a firm obtains or maintains a position of dominance via anti-competitive practices which frustrate the mechanism of the market and work against the legitimate interests of competitors, suppliers or buyers, then there should be means to prevent such conduct. The act will establish guidelines and give examples so that the courts and businesses will know what is considered anti-competitive behaviour.

Paradoxically, a third myth centres on the effects of the proposals for small businesses. My consultations with the small business community show that the proposals have strong support. Nevertheless, I recognize the uncertainty that may have been generated by extreme examples such as one which says the law could be used to prevent two small, family-run hardware stores from merging. Clearly, the bill will not have that aim.

What the law will do is protect the small hardware store from the potentially anti-competitive activities of a major supplier or competitor. It would, for example, prevent a national retailer from undercutting a local firm only in the local market, drawing away customers and forcing the local firm to close its doors. The short-term gain for the consumer would be more than offset by the loss of an established, locally-run business, and with it the opportunity for choice and service.

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A fourth myth is that reformed competition legislation will somehow work against Canada's opportunities for international trade. This myth is based on the belief that only large enterprises can compete in international markets. Quite apart from ignoring that the proposals do nothing to impede growth, this myth fails to note some of the great success stories of Canadian business.

Effective competition places pressures on firms to be efficient and innovative. There is no substitute for a competitive environment in ensuring that firms are charging the lowest prices possible, are offering the highest quality products, and are fully prepared to meet the challenges of operating in the global marketplace.

Consider the simple facts of three Canadian businesses operating in the competitive international market.

Mitel Corporation, in a few short years, has become a world-class competitor in specialized telecommunications equipment and innovative micro-electronic devices. Its history of growth is astonishing. In 1974 it had annual sales of 12 thousand dollars; in 1980 it had sales of 111 million dollars. Mitel now has eight plants around the world, with two more announced just two weeks ago.

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Perhaps Mitel's figures demonstrate all that needs to be said about how large a company must be to compete in the tough international markets.

Consider another example of a smaller Canadian firm competing successfully by being innovative, by exploiting new technologies and by developing distinctive new products to fill specific needs.

CAE Industries has built a reputation as a world leader in the design, production and sale of flight simulators for commercial aircraft. Its list of customers includes Eastern Airlines, TWA, British Airways, KLM, and Air Canada. Now, CAE is showing the way again, in the development of lightweight components for the new automobiles of the '80s. They are importing European technology to introduce a new, sophisticated diecasting process. Incidently, CAE was one of the suppliers which contributed to the amazingly successful "Canadarm" built under contract for the NRC for the space shuttle Columbia.

Yet another company which has prospered in competitive conditions abroad is Bombardier Inc. After developing and marketing the new LRC train in Canada, Bombardier has gone on to become a major competitor in the North American mass-transit equipment market. Bombardier has made extensive sales in the United States, and has also obtained contracts to sell commuter trains to Mexico.

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Clearly, lively international competition has greatly benefited each of these firms, none of which can be considered large by international standards.

I can assure you that my legislation will do nothing to impede the international development of competitive, innovative firms such as these.

And finally, what about the suggestion that Canada is out-of-step with other industrialized countries in moving to revitalize competition in its economy? The facts suggest that this, too, is a myth.

The Canadian economy has one of the highest levels of concentration of all Western industrial countries, and some of the weakest laws to deal with it. Add to this the fact that recent court decisions have rendered what existing protection there is all but unenforceable. The result is that the public has become justifiably concerned about the threat to competition.

In other countries, national governments have long since moved to protect the marketplace from the dangers of corporate concentration, without any evidence that economic growth has been hindered.

The United States, which clearly has more stringent legislation than ours, is the most obvious example. Another is West Germany which made major revisions to its competition policies in 1973. For example, German law requires any company controlling 20 per cent or more of the market to give advance notice of any planned merger.

Those who have been part of the consultation exercise know that our proposals do not go that far.

Still another example of a country which has not failed to act to protect competition in its domestic market is Australia. In 1974, a revision of its competition policy relied heavily on the American experience and set forth clearly in law examples of anti-competitive activities. Such activities are judged "per se" contrary to free competition when practised by firms which substantially control a market.

These are but three instances which show that the Canadian government is in step with other nations and, in fact, is moving to catch up with reform already carried out elsewhere.

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Mr. Chairman, when I first accepted your invitation to address this conference, I thought that by now we would have begun a new session of Parliament, and that I would be in a position to speak in detail about the bill that I had tabled in the House of Commons. Unfortunately the start of the new session has been delayed slightly. My bill is at the drafting stage, and I am not in a position to talk freely about it. Nevertheless, I can outline in general terms what it will do.

First and foremost, it will re-introduce into the Canadian economy the advantages of vigorous competition. It will promote fairness and will be fairly applied. It will help Canadian business, small business, and help the economy. It will encourage the creation of productive jobs. It will mean better prices and more choice.

The law will not hurt businesses that are willing to compete nor will it result in business inefficiency. It will only end abuses and ensure that some companies do not gain so much power that they can disregard the rights of other businesses and the consumer's pocketbook.

The task before us is to set the rules so that businesses in Canada will know what they can and cannot do. In this way they can spend less time worrying about government regulation and more time doing what they do best: producing the goods and services that the Canadian economy requires.

Speech Discours

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

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S-82-10

NOTES FOR AN ADDRESS TO

THE IMPACT OF REGULATORY REFORM IN CANADA

AND THE UNITED STATES CONFERENCE

BY

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CONSUMER AND CORPORATE AFFAIRS CANADA

TORONTO, MAY 20, 1982

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1. Salutation and Introduction

I am delighted to be with you this afternoon to discuss the role of competition policy in Canada with respect to industries which may be the subject of regulatory reform.

I believe that, at the close of tomorrow's sessions, you will have a clearer understanding of the extent to which the movement towards regulatory reform encompasses a fundamental re-examination of the ways in which government and industry relate and the implications of this process for Canadian industry in the decade of the 1980s.

You will be hearing from key industry and government representatives what the regulatory reform movement will mean in a number of critically important industries, and more particularly what the prospects for deregulation are in these industries.

My focus will be on how competition policy has been applied to ensure that the benefits of regulatory reform are actually materialized by consumers and where it may be so applied in the future.

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I will be limiting my consideration of regulatory reform to those situations where governments give up or substantially reduce the direct control they have exercised of such essential determinants of industry structure and performance as prices, entry into and exit from the industry, standards of service and terms and conditions of sale. Direct regulation has been the norm in Canada for taxicabs, airlines, for-hire trucking, fisheries, some agricultural products, and electrical and natural gas transmission and sale, among other industries.

The raison d'être of direct regulation is to overcome perceived structural problems in an industry which, if left unchecked, would generate results which are not in the public interest. Direct regulation takes the place of "regulation" of industry by market forces, and in this sense can be viewed as a substitute for an active competition policy. Therefore, the underlying premise of deregulation is that competition can and should be relied on as the regulating force in certain markets.

It is my basic view that effective competition law in Canada is essential if the move toward greater competition in (directly) regulated industries is to be successful.

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As I will discuss in greater detail shortly, we face in Canada some significant problems in ensuring that the full benefits of regulatory reform are obtained: better competition policy tools are needed to overcome these problems. This is particularly so given the fundamental importance to the Canadian economy of the probable candidates for deregulation: trucking, airlines and telecommunications. The efficiency improvements that deregulation can bring these industries would be shared either directly or indirectly by virtually all Canadian industries and consumers. Equally, however, the costs of any failure to achieve a truly competitive environment in these industries after deregulation will also be absorbed by all Canadians.

First, however, I would like to consider briefly some differences that I detect in the American and Canadian approaches to deregulation, the requirements of an effective competition policy under deregulation, and some recent activities of the Bureau of Competition Policy with respect to regulated industries.

2. Deregulation in Canada and the United States

Deregulation in the United States has been characterized by direct legislative action to eliminate regulatory machinery considered to be no longer necessary. The best example of this approach is the Airline Deregulation Act of 1978.

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As well, the deregulation movement in the United States has most recently extended to the area of broadcasting regulation, particularly F.C.C. regulation of cross-media ownership, an area of regulation which has not been the subject of deregulation pressure in Canada. Overall, the process of eliminating direct regulatory control of certain industries is much further advanced in the United States than it is in Canada.

In my opinion deregulation in Canada will not likely match the American experience in extent or abruptness. Rather, we will more likely follow a gradualistic approach that promotes greater competition within existing regulatory frameworks. Where direct regulation has been administered by independent boards and agencies in Canada, these bodies will, in all probability, continue to retain certain of their statutory and discretionary regulatory powers.

3. The Requirements of an Effective Competition Policy

Regardless of the formal means used to deregulate, effective competition law remains an essential ingredient to successful regulatory reform. Regulation has been effective in moulding the structure of regulated industries and affecting the behaviour of regulated firms.

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These structural and behavioural patterns, which are the legacy of regulation, are potentially threatening to the successful transition from control by government regulation to control through the forces of market competition. Competition law must be equally effective if it is to ensure the achievement and continuation of market-based results.

Specifically, competition law must do three things:

(1) Nurture and protect competitive behavior in these markets during the crucial transition period until competition firmly takes root;

(2) ensure that the new, evolving <u>structure</u> of the industry will sustain effective market competition in the long run; and

(3) ensure that competition continues as the effective means of controlling activity or behaviour in the market over the long run.

In view of the importance of these functions to successful regulatory reform, it might be argued that deregulation itself may not be wise unless adequate safeguards for competition exist.

Yet in Canada, as compared with the United States, our competition law tools are generally inadequate and our jurisprudence covering the application of competition law to the activities of "regulated firms" is poorly developed.

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In short, Canadian competition law is not nearly as detailed or as stringent as U.S. competition law in relation to regulated firms. The problem in Canada is further complicated by constitutional and jurisdictional uncertainties arising from jurisprudence concerning the application of federal competition law to provincially regulated activity.

Specifically, it has been contended that the Combines Investigation Act has no application whatsoever to industries which are subject to self-regulation, i.e. the lawyers. In my view, a careful reading of the jurisprudence indicates that the criminal provisions of the Combines Act has no application to provincially regulated industries only where these industries are actually controlled or effectively regulated by a regulatory body established to protect the public interest. Thus, the Combines Investigation Act clearly applies with full force to newly deregulated firms even though the full machinery of regulation may remain on the statute books.

4. Activities of the Director in Relation to Regulated Industries

In spite of the limitations of our competition law tools, we have done much to further competition in regulated industries and we intend to do much more. The primary focus has to date been through the Director's statutory right to

intervene before boards, commissions or other tribunals "in respect of the maintenance of competition." For illustration I would like to refer to our work in just four regulated industries -- transportation, telecommunications, securities, and the legal profession.

In the transportation field the Bureau intervened in the 1978 Canadian Transport Commission hearings into the proposed acquisition of Nordair by Air Canada to oppose the merger contending that the merger would substantially reduce competition in inter-city air transportation in Eastern Canada and further increase an already high level of concentration in the industry. The Director has also advocated better defined regulatory controls by the CTC over shipping conventions, cartels which govern the general freight shipping industry. Prosecutions under the conspiracy provisions of the Act are currently pending against several trucking tariff bureaux and their member firms.

The Bureau has been particularly active in telecommunications. In separate cases before the CRTC, the Director has supported applications for access on reasonable terms to Bell Canada's network by CNCP Telecommunications, mobile telephone services and paging services, all of which were strenuously opposed by Bell: a classic situation of a refusal to deal with competitors by a monopoly which controls "bottleneck services" critical to the competitors' survival. In each case the applicant succeeded in opening up part of Bell's monopoly to competition.

Again within the realm of monopoly refusals to provide services on a non-preferential basis, the Bureau has, commencing with 1977 CRTC hearings, sought to alter terms of the connecting agreement between Teleset Canada and the Trans Canada Telephone System companies in order to require Teleset to market satellite telecommunications services to the public rather than restricting direct access to such services to a "customer list" made up of select telecommunications carriers. The Bureau has also intervened before the CRTC, the Public Utilities Board of Alberta, and the Ontario Telephone Service Commission in policy making hearings to support broad deregulation of the telecommunication terminal equipment market by allowing the attachment of customer-provided equipment.

I have also intervened at hearings of the Ontario Securities Commission into the merits of fixed and flexible brokerage rate systems. My analysis of each system has made me a firm supporter of a system of negotiated and flexible brokerage rates. I am convinced that such a system will reduce commission rates on large trades, increase operational and allocational efficiencies and increase efforts to serve retail clients well, increase firm diversification, reduce regulatory burdens and improve the preparedness of Canadian firms to meet increasingly strong international competition.

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The Bureau has also advocated greater advertising freedom within the regulated professions and has intervened in support of Donald Jabour's challenge to the British Columbia Law Society's prohibition against price advertising by lawyers. As a result of this intervention the issue of the applicability of the Combines Act to fetters on competition imposed by the self-regulating professions is presently before the Supreme Court of Canada. I fully expect that the court in its decision will clarify the scope of the Combines Act with respect to regulated industries in a fashion which makes enforcement of the Act more effective.

5. What We Will Do: Overview of the Director's Intentions Regarding Advocacy/Enforcement Activities in Regulated Sectors

I would now like to turn to the advocacy and enforcement issues which are most likely to emerge should the Canadian trucking, airline and telecommunications industries move toward deregulation. I have selected these industries for individual consideration as they have experienced some reduced regulatory control in Canada in recent years and are generally considered to be the most likely candidates for further deregulation. And as I have previously noted each industry has a critical and pervasive role in the Canadian economy.

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(a) For-Hire Trucking

The for-hire trucking industry is characterized by a substantial number of firms in each province. As well, the for-hire sector is faced with active competition from private trucking and leased trucking operations. Although it is fair to say that the industry is not characterized by undue concentration or market dominance by one or a few firms in major markets, nevertheless there is considerably greater concentration of ownership in interprovincial for-hire carriage and some sectors with relatively high costs of entry such as used household goods carriage and Less-Than-Truck-Load carriage. In the case of these two sectors, the entry costs are both physical capital costs and information costs associated with developing interlining arrangements and terminal facilities.

Provincial trucking regulators have not discouraged the development of trucking Tariff Bureaux which have acted, in my view, in some instances as price fixing cartels. Tariff Bureaux pricing activities will require particular scrutiny should regulatory entry constraints be reduced. Collective rate making within Tariff Bureau may be utilized by existing firms as a vehicle to allow predatory pricing in those markets of immediate interest to new entrants. As well, Tariff Bureaux provide truckers with the means of efficiently making interlining arrangements. Interlining increases efficiency and permits smaller firms to expand the area

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they serve. Formal or informal tariff bureaux action to close off new entrants from such easy interlining arrangements or from for-hire terminal facilities which tariff bureaux members, in large part, control in Canada, would be cause for concern by the Bureau of Competition Policy. The principal goal of the Bureau, should trucking become less regulated, would, therefore, be to actively ensure that established firms do not utilize any advantages obtained under regulation to curtail the development of increased trucking competition through the entry of new firms.

Some supporters of trucking regulation have argued that regulation has prevented undue concentration in the industry. I would disagree. The best available economic evidence indicates that there are no substantial non-institutional entry barriers or economies of scale in trucking. Recent research for the Economic Council of Canada also indicates that concentration of ownership is higher in provinces which exercise entry regulation than in provinces which do not. I therefore intend to actively support efforts to introduce substantially greater competition in those provinces which continue to exercise price or entry control over the for-hire trucking industry.

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(b) Airlines

Unlike the for-hire trucking industry, the Canadian air transport industry can readily be designated as highly concentrated and dominated by a single firm -- Air Canada. Indeed in recent years both the concentration and level of government financial control of the industry has increased despite some individual decisions of the CTC, notably with respect to charter travel, aimed at increased competition.

If the CTC moves to relax entry and price control as has been recommended by both the Economic Council of Canada and the April Report of the House of Commons Standing Committee on Transport on Domestic Air Carrier Policy, a major goal of the Bureau will be to ensure that the current level of concentration does not overwhelm efforts to increase airline competition.

It may become necessary to seriously re-examine Air Canada's corporate structure and its traditional role as the "national carrier," features which have permitted Air Canada to develop among Canadian airlines, the only complete integrated domestic transborder and international route structure, a feature which puts this carrier at a possibly overwhelming competitive advantage when compared to smaller inter-city airlines.

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The Bureau may also find it necessary to pay more careful attention to special or promotional fare filings to protect competitors against predatory behaviour by the largest carriers and to intervene in such matters where appropriate. As well, in light of the high level of concentration among inter-city airlines, I intend to take a tough stand against any future merger activity among these carriers.

(c) Telecommunications

In trucking and airlines the motivating forces behind direct regulation were concerns that these industries were inherently unstable economically and the desire to build a high quality transportation infrastructure to tie together a young nation. In telecommunications the rationale for regulation has been that these services could most efficiently be provided by one firm -- that there was a "natural monopoly." The scope of this natural monopoly has over time been progressively reduced by technological change to the point that observers generally contend that, if such a monopoly even exists now, it is confined to the local switched telephone network. All other elements of telephone service terminal equipment, long distance, data communication, and other specialized services should therefore be subject to competition.

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In telecommunications the objective of competition policy becomes ensuring that only those services which can be demonstrated to be true natural monopolies should remain so and that all other service areas are quickly opened up to full and fair competition.

However, a number of very effective means are available to the telecommunication utility in aid of efforts to preserve its monopoly or at least to substantially delay increased competition. They include:

(1) Pricing policies which cross subsidize competitive services by monopoly services. At present tremendous latitude is available to telecommunications utilities in the area of pricing policy largely as a result of the meagre resources of regulatory bodies relative to the carriers and the fact that Canadian telecommunication regulators have yet to develop useful costing methodologies which might enable the detection of cross subsidies among existing services. The CRTC has, however, taken the initiative and beginning in June will hold hearings aimed at developing such a methodology. The Competition Bureau will be a major intervener in these proceedings.

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(2) <u>Control of access to monopoly "bottleneck" facilities required by competitors.</u> I have already pointed to the progress made before the CRTC in obtaining fair access to the switched network by CNCP Telecommunication, mobile telephone and paging services. This refusal to deal issue may well emerge again, with even greater significance, in relation to access conditions and charges for competing switched long distance and local telecommunication carriers, the supply of satellite services, carrier control over Yellow Pages advertising, and, in relation to the question of whether regulated common carriers should be compelled to market assets, such as customer lists, which have obtained a new value in a competition environment.

(3) <u>Regulatory or carrier prohibitions on the resale or sharing of common carrier services such as bulk discounts WATS and private line services.</u> Such prohibitions permit the monopoly carrier to segment the market and to charge unreasonably high prices for monopoly services, thus positioning the firm to better meet competitive incursions in other telecommunications markets.

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(4) <u>Pricing in place terminal equipment and inside wiring below market value</u>. This is a means of artificially reducing the market opportunities for terminal equipment competitors and amounts to a hidden cross-subsidy from monopoly to competitive services.

The variety of potential means for the exercise of residual monopoly power by telecommunications utilities will almost certainly call for a particularly vigilant stance by the Bureau of Competition Policy in relation to this sector for some time to come. If the American experience is any indicator, it will probably be many years before the Canadian telecommunications industry ceases to be dominated by the original monopoly telephone companies and achieves a sustainable competitive balance.

6. Conclusion and Summary

I would like to conclude by summarizing my main points. There are seven:

(1) Competition can be an effective regulator in many markets now subject to direct regulatory control by government.

(2) Competition Policy can play an important role in promoting greater reliance on competition, and possibly deregulation, in these industries.

(3) Competition law has two major functions that must be performed if the "change of regulators" contemplated by deregulation is to be successful:

(a) it must ensure that competition is allowed to properly take hold during the crucial transition period; it must guard against anti-competitive behaviour and ensure the evolution of a new market structure that will support competition;

(b) and it must ensure that competition is effectively maintained over the long term.

(4) The basic tools of Canadian competition law are at present inadequate to fulfill this role.

(5) Our jurisprudence regarding the application of competition law to regulated industries needs substantial development

(6) The effectiveness of deregulation in Canada will be linked to the effectiveness of our competition law in performing the functions required of it.

(7) In view of the stakes involved and the importance to the Canadian economy of the sectors involved, improved Canadian competition law is essential.

Speech Discours

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

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NOTES FOR AN ADDRESS TO

THE CANADIAN ELECTRICAL DISTRIBUTORS ASSOCIATION

CONFERENCE

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CONSUMER AND CORPORATE AFFAIRS CANADA

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FINE-TUNING WITH CERTAINTY

INTRODUCTION

Canada uses many of the same economic policy instruments as other western industrial countries to influence the structure, conduct and performances of its economy. Competition policy is no exception.

I do not intend to take the time here to trace, even briefly, the history of competition policy in Canada -- except to point out that anti-combines legislation in Canada preceded passage of the United States Sherman Act by one year. A headstart we have found difficult to maintain!

I would like to consider today whether the substance of competition policy in Canada should be the same, given differences in economic structures, development and cyclical positions, as that of other countries.

More specifically, I would like to discuss with you this morning a cluster of the parameters within which competition policy must operate in Canada. Individually perhaps, they are not unique in the international context. Taken together, I can tell you they loom very large to me as Director of Investigation and Research -- and by international comparison, may indeed be unique.

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Among those characteristics of the Canadian economy which serve to complicate policy formulation and administration and seem to require competition policy to take on the role of a balancing act among conflicting demands are:

1) small domestic market,
2) open economy,
3) open -- but still characterized by protection,
4) oligopolistic structural features of many major industries and high levels of concentration,
5) balkanization of the domestic market,
6) high incidence of foreign control and in particular strong economic interlocks with the United States,
7) scale and specialization characteristics that create problems both for international competitiveness and for domestic competition policy,
8) government influence,
9) absence of populist underpinning, and
10) global developments.

Let me expand briefly on the dimensions of these characteristics and developments that call for competition policy in Canada to resemble a juggling act to be performed on a tightrope.

(1) Small Domestic Market

- In relation to our major trading partner, the Canadian economy is small. In 1981, Canadian GNP of $341 billion was equivalent to about 10 per cent of U.S. GNP of nearly $3.5 trillion Canadian.
- This factor of nine or 10 emerges pervasively through the comparative macro and micro economies of Canada and the United States. For example, total consumer spending in Canada last year amounted to $190 billion or 8.5 per cent of consumption in the U.S.

(2) Openness of Canadian Economy

- Although Canada's international exposure is not unlike that of some smaller European countries, it is much more open that most of our main economic partners. As a result, Canada is particularly sensitive to global change and uncertainty. For example, in natural resources where Canada has an important comparative advantage, international trade in raw materials is decliming as a share of total trade.
- Another feature of the openness of the Canadian economy is its exposure to U.S. institutional, trade and cultural links. This bilateral interdependence,

from a Canadian standpoint, serves to circumscribe the scope of competition policy in this country. In particular, investment and production decisions will not tolerate significant divergences in institutional arrangements in a North American economy characterized, for instance, by an almost completely open capital market.

- A particularly important link between Canada and the United States is the MNE. Because I shall deal later with certain features of foreign ownership, suffice to note here that intra-company trade accounts for about half of all Canada-U.S. trade. In these circumstances, I need not spell out the implications of transfer pricing for allocative efficiency in the Canadian economy.
- A measure of the distinctive openness of the Canadian economy is the high proportion of GNP accounted for by trade. In 1981, exports amounted to 30 per cent of Canadian GNP. In contrast, U.S. exports and imports each accounted for only about 12 per cent of GNP.

(3) <u>Open But Still Tariff-Protected</u>

- Notwithstanding the high international exposure of the Canadian economy, relatively high tariff protec-

tion remains a continuing feature in Canada. For example, estimates of average tariff levels, following implementation of the Tokyo Round, fall from about 15 per cent to nine per cent. In comparison, U.S. tariffs fall from about eight per cent to about five per cent.

- In the semi-finished goods category, again following full implementation of the Tokyo Round, estimated average tariff levels in Canada will be 8.3 per cent, compared with 3.6 per cent in the U.S., 4.6 per cent in Japan and 4.2 per cent in the E.E.C.
- In addition to explicit tariff protection, there are, of course, in Canada, perhaps to a lesser extent than other major trading economies, non-tariff impediments which, although difficult to quantify, may equally be restrictive of trade.

(4) <u>Oligopolistic Structure</u>

- Concentration levels in Canada, compared on an industry-by-industry basis with other industrial countries, show that concentration is almost always higher in Canada.
- Estimates prepared in my Bureau indicate that 96 per cent of the five-digit SIC categories in manufacturing had four-firm concentration ratios of 50 per cent or more.

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- Further analysis in my Bureau shows that these trends in concentration have little to do with changes in plant size in pursuit of scale economies -- but are instead positively and significantly related to horizontal mergers.

(5) Balkanization of Domestic Market

- The segmentation of the domestic market in Canada has arisen through the growth of provincial regulation that either controls interprovincial trade directly or indirectly through specific product standards. Analysis of provincial regulatory statutes done recently by the Economic Council of Canada shows that there are more than 1,600 provincial regulatory statutes -- many of these applying to occupational and professional licensing.

(6) Foreign Influence

- Even though foreign control of Canadian manufacturing assets has declined pretty steadily since 1968, (from about 60 per cent to about 50 per cent) the fact remains that it exceeds levels in other industrial countries.

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- In certain major sectors foreign control exceeds 80 per cent -- petroleum and coal, rubber and tobacco products are important examples.
- Foreign controlled firms on average are larger than Canadian-controlled firms. (In a sample of 64 manufacturing industries, only four industries showed domestic-controlled firms to be larger than their foreign-controlled counterparts.
- Foreign controlled firms are more profitable than those characterized by resident ownership.
- Notwithstanding these size and profitability differences, there appears to be no significant relationship between foreign ownership and growth in Canadian industry.
- Recent testing has cast doubt on the hypothesis that foreign-controlled subsidiaries operating in Canada typically undertake mainly adaptive, rather than original research and lack the freedom to exploit their inventions in export markets. (In fact the foreign control variable becomes significant only at a very high level, even in high technology industry and then appears with a positive sign.
- Another important dimension of foreign influence arises in Canadian labour markets. Although only about 31 per cent of the labour force in this

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country is characterized by union membership (which is somewhat higher than the comparable figure for the U.S. -- but lower than most European countries), the significant feature in this context is that the proportion of total membership which is organized by international (i.e. U.S.) unions is almost half. Notwithstanding the declining share, internationals counted about three quarter of a million more Canadian workers in their ranks last year than in 1961.

- Another dimension of reliance arises from the observation that about two-thirds of Canadian trade is destined for or comes from the United States.

A further indication of Canada-U.S. economic interconnections is reflected in capital market flows. In our bilateral account with the U.S., the large outflows of direct investment (by Canadians in the U.S. and return to Canada of direct investment held by Americans) amounting to seven billion dollars in 1981 was just about equal to the portfolio investments of Americans in Canadian securities.

(7) Size and Economies of Scale

In Canada, plant-specific economies of scale have attracted most of the attention in economies of scale research. In general, these studies show that although significant in a few industries, plant-specific scale

economies have not imposed major cost disadvantage on Canadian firms serving the Canadian market.

However, two important sources of scale inefficiency have emerged in Canada. First, in order to compete with imports and satisfy consumer demand, Canadian firms in tariff-protected oligopolies tend to produce full lines of products. As a result, each plant produces a wider product line with less specialized machinery than, for example, similar sized plants in the United States.

Second, owing to the high incidence of foreign ownership in Canadian goods-producing industries, taken together with limited specialization, Canadian firms are unwilling or unable to undertake the continuous R&D effort required to compete both at home and abroad.

In addition, firm level economies -- associated with undertaking investment in higher risk areas such as energy exploration and aerospace and in longer term R&D -- further contribute to large firm size in Canada.

In the late seventies, research undertaken for the Royal Commission on Corporate Concentration in Canada and in my own Bureau contributed significantly to understanding the distinctive features of economies of scale in Canada. The points I wish to extract from that research for this purpose are: that large firms have no inherent advantages in export activity; that Canadian evidence that innovative activity

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rises more than proportionately with firm size is not at all compelling; that plant sizes in Canada are closer to efficient size in low-tariff than high-tariff industries; and finally the persuasive argument -- arising out of the observation that the stock of capital per person employed is higher in Canada that in the U.S. and some other countries -- that, what is called for, is the much more effective use of existing plant and equipment rather than tax or other uncentives to create more -- or to further contribute to the size of already large firms.

(8) Government Influence

- The nature and extent of government involvement in the economy is quite different in Canada than in the United States, for example. Because we have a much higher degree of public ownership and persuasive direct regulation, competition policy in Canada is called upon to play a reduced, or at least a different role than is U.S. antitrust policy.
- In addition, the role of both federal and provincial governments in assisting economic development by direct and indirect means is more common, and more widely accepted in Canada than in the U.S.
- One important influence of government in the economy is the pervasiveness of government regulation.

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Canadian estimates suggest that about 26 per cent of the Gross Domestic Product is subject to direct controls on price or output. (This is slightly higher than comparable estimates for the U.S.)

- An industry specific example of the important role government plays is provided in airlines where the largest and fourth-largest carriers are owned by the federal government. The third-largest and fifth-largest are effectively controlled by provincial governments and all are regulated by the Canadian Transport Commission with respect to entry and price.

(9) Absence of Populist Underpinning

An important historical string in the U.S. antitrust policy bow is missing from the conceptual framework for competition policy in Canada and has the effect of creating policy boundaries that are significantly narrower in Canada than in the United States.

The reference here is to the inclusion of the diffusion of economic power as an integral plank in the platform of competition policy objectives. It is true that a perception of the need to prevent excessive accumulation of economic power served initially as a major element in the ideological basis for antitrust policy in both countries.

However, whereas the notion that more decision units are preferable to less has maintained more or less continuing priority in the United States, such an objective has not survived the passage of time in Canada. As a result, the rationale for avoiding the abuse of massive power, with its political and social implications, by preventing its excessive accumulation, does not seem to be present in Canada.

(10) Global Developments

It would be remiss for me to conclude this partial list of constraints without recognizing explicitly developments on the global horizon. In my view, the more important of these are:

- increasing global interdependence, particularly in the realm of the MNE and international capital markets;
- differing rates of inflation and related consequences for international competitiveness;
- increasing direct and indirect government involvement in international trade, including changing export and R&D policies in Japan and France; and
- rising unemployment in western economies with blame often attributed to the liberalized trading regime, existence of MNEs, or advancing technology.

Conclusion:

What are the conclusions about competition policy in the Canadian context? I venture the following: first, our competition laws must be primarily based on performance and efficiency considerations rather than promoting competition for competition's sake. Thus, our law should be concerned with consumer welfare effects and not primarily with structural issues. This means we will have to tolerate higher levels of concentration than one major trading partner. We should be more concerned with what dominant firms do than with the fact of dominance. Second, I endorse a statement from the Sheoch-MacDonald report on revisions to the Combines Act published in 1976. In Canada,

> "more refined decisions are required that respond more fully to the facts of each case and to the requirements of the Canadian economy."

But these objectives point out one of the conundrums of devising a sensible competition policy for Canada, namely, the objectives are contradictory.

On the one hand, you want certainty -- on the other, expert judgment on a case-by-case analysis.

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On the one hand, Canadian policy in this area requires fine-tuning; but on the other, mistakes can be very costly in a small economy.

On the one hand, you don't want the "fine-tuning" to displace market decisions; but, on the other, the more you allow fine-tuning, the more you move to discretionary, government regulation.

Therefore, we must decide where, on the spectrum between the extremes of <u>certainty</u> and <u>discretion</u>, to draw the line.

We have been trying for more than 10 years -- without much success -- to introduce improvements to the provisions of Canadian competition policy.

C'est en forgeant qu'on devient forgeron -- practice makes perfect -- or in Canada -- hope springs eternal.

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Speech Discours

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

S-85-28

REMARKS TO THE PRESS

REGARDING

COMPETITION LAW AMENDMENTS

BY

THE HONOURABLE MICHEL CÔTÉ

MINISTER OF

CONSUMER AND CORPORATE AFFAIRS CANADA

OTTAWA, DECEMBER 17, 1985

Canada

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A few minutes ago I tabled for First Reading in the House of Commons a Bill to strengthen Canada's competition law. A strong, effective competition law is an essential part of the government's economic policy. We believe in the private sector, the marketplace, as the prime stimulus for economic growth, optimal resource allocation, and job creation in the economy. As we deregulate, we will increasingly rely on market forces to develop a dynamic economy.

This is not simply a matter of political philosophy. There is a critical need to update our economic legislation. The changes we are proposing will give Canadians an effective, enforceable, and up-to-date competition law -- something that is long overdue.

Competition law is like a constitution -- a Charter for the marketplace. It sets the rules of the game. Canadians need a competition law that works. The existing law belongs in a museum, not in the marketplace. It is out of date, and out of touch.

When I took over the Consumer and Corporate Affairs portfolio, I reviewed the progress that had been made on competition law reform by my predecessors. It was a good foundation, but a number of key elements were missing.

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Our objectives are straightforward. We want a clear and enforceable law that will give consumers meaningful protection. We want a competition law that will protect businesses, particularly small businesses, from dominant firms that abuse their market power. We want to ensure healthy competition as the government reduces economic regulation in the marketplace. We want to remove potential roadblocks, help our businesses compete in world markets -- and to meet and beat the foreign competition -- and create more jobs.

The Bill I tabled today is a realistic and workable package of amendments. We have consulted extensively, listening not only to business interests, small and large, but to the provinces, to consumers, and to organized labour.

Some people say that it took longer than expected. We have taken as long as necessary to get it right, and I am satisfied that we have succeeded.

You have been provided with background material and you are invited to attend the technical briefing that my officials will be giving after this press conference.

Let me deal now with the highlights of the Bill. For me, these are the most important features.

For the first time, international competition is given explicit recognition and more emphasis throughout the Bill. This is the new reality for Canadian business. Canada is,

first and foremost, a trading nation. The law will recognize that high levels of concentration may be necessary to make Canadian industry world competitive, to the benefit of consumers and business. Our new merger legislation reflects this.

New provisions for specialization agreements will help Canadian industry meet the challenge of foreign competition in our home markets. We are also broadening the export exemption under the conspiracy provisions. This should enhance Canada's export trade by facilitating the formation of export consortia.

Updating the law is necessary, but it is not sufficient. There must be a good adjudicative process as well. We are taking a unique approach on this matter through the creation of a new Competition Tribunal.

The Tribunal has been designed with judicial and lay appointments. It will provide the procedural fairness of the courts and the economic and business expertise that is necessary to deal with complex competition matters. The Tribunal will have the power to adjudicate and issue remedial orders in non-criminal areas such as mergers, abuse of dominant position, and other anti-competitive trade practices.

With respect to the merger provisions, you can expect to see some changes. Canada has never really had an effective merger law. This Bill will give us one. The new Competition Tribunal will be able to stop mergers that

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"lessen competition substantially" and do not offer offsetting efficiency gains. The Bill also has a provision for prenotification of large mergers. This will enable the government to review large, complex mergers before they are completed.

Small businesses can be badly hurt by anti-competitive practices of firms that dominate markets. This type of behaviour is not only unfair, it strikes at the spirit of entrepreneurship that is essential to our economy. The Bill will give small businesses what they have been asking for -- a fair and equal chance to compete.

I would like to finish by going back to the points I made at the outset of my remarks. I want to send a very clear message. We want Canadian businesses and consumers to enjoy the benefits of fair and healthy competition. Canada needs an effective competition and has waited long enough.

This Bill is reasonable and balanced. It enjoys a broad measure of consensus and support. It will give us a strong and effective competition legislation. This Bill is a high priority for the government. I intend to do everything I can to assist Members of Parliament in reviewing the Bill so that it can move as quickly as possible through Parliament and become law.

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Speech

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

S-87-5

NOTES FOR REMARKS

BY

THE HONOURABLE HARVIE ANDRE, P.C., M.P.

MINISTER OF CONSUMER AND CORPORATE AFFAIRS CANADA

AND

MINISTER RESPONSIBLE FOR CANADA POST

TO

THE GORDON GROUP 1987 EXECUTIVE PROGRAM

COMPETITION AND CORPORATE CONCENTRATION

THE SHERATON CENTRE

TORONTO, ONTARIO, MARCH 31, 1987

Canada

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I am sorry that Cabinet commitments prevent me from being with you in person. I am pleased, however, to be able to speak to you, via this medium, on the subject of corporate concentration -- an issue that has been attracting a larger share of media and public attention.

Let me first express my delight with the initiative of the Gordon Group in putting this conference together. The more you know about the new Competition Act, the better it will work and the less the government will have to use its legislative powers.

The government modernized a policy that was long overdue for change. Although there may still be some wrinkles to iron out, we think the legislation contains flexible instruments that recognize the economic realities confronting Canadian business in both the domestic and global marketplace.

The new competition policy was developed with a broad consensus among public- and private-sector interests to safeguard competition in Canada. The Competition Act passed last June will provide a balanced and more stable environment for the private sector to function as effectively as possible.

When I accepted the invitation to speak today, I had planned on talking about the Act, the Tribunal, and other parts of our legislation with direct implications for the corporate sector. But, I think my contribution to this

discussion will be repetitive since you certainly have the right speakers addressing the right issues.

Instead I will talk about another emerging issue that is being drawn to the government's attention -- aggregate corporate concentration. Over the last few months, we've seen newspaper headlines heralding the dangers of high and increasing concentration. These articles state that the clothes we wear, the milk we drink, the chocolate bars we eat, the gas we pump into our cars, the mortgages we have on our homes, all in one way or another add to the income and profits of a small group of large conglomerates. Some people say that we pay higher prices than necessary for these products or services. Others say the conglomerates are controlled by a few families whose wealth provides them access to the political process. Stories are written about the conglomerate families and the mega corporate mergers they consummate with borrowed money. Editorials have demanded hearings to disallow or review certain takeovers. Others predict Canada will become an economic oligarchy where the corporate elite will preside over the welfare of Canadians. While 1984 is behind us, these articles seem to imply the Orwellian world has yet to visit us.

There is <u>one</u> thing I know for sure, and that is people are becoming more concerned about what's going on out there

and what impact it's going to have on them. In a recent Decima poll, of those who said mergers were increasing, more than 70 percent expressed concern about the trend.

But this concern is not new. In the 70s, public nervousness prompted the establishment of a Royal Commission to examine the issue of corporate concentration. Its report in 1978 documented Canadians' concern over the ability of large corporations to influence public policy. However, the Commission concluded there was no real evidence to support those concerns.

Now we're in the 80s, and concerns over corporate concentration are being raised virtually every day in the national media. Every time another takeover hits the news, it sparks a new round of speculative articles, questions in the House of Commons, political speeches, and even books on corporate concentration in Canada.

The environment we're dealing with now is considerably different than the one in the 70s. I want to talk a bit about that environment, because it has contributed significantly to the tone of the current debate.

We have no doubt seen an increase recently in very large takeovers, both within Canada and even in Canadian companies taking over much larger American firms. These processes dominate the headlines for weeks as the business community and the public follow the story with the same zeal

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some devote to "Dallas" or other television soap operas. And why not? They are high drama.

When non-financial companies take over financial institutions, concerns are raised over conflict of interest and the protection of life savings. This has been particularly underlined by the failure of two banks and a number of trust companies. Questions have been posed on the integrity of our financial institutions and on the adequacy of our regulatory system -- something most people used to take for granted.

Star Wars has been replaced by takeover wars. Target firms hostile to a particular corporate suitor search for "white knights" to rescue them. If what cannot be avoided is inevitable, a "poison pill" is kept in hand. Or other tactics described by equally emotive images such as "scorched earth" and "golden parachutes" are used. As takeover activities have increased, so too has the concentration of wealth in Canada. The press has been preoccupied with comparing the number of billionaire families per capita in Canada and the United States, and even documenting lifestyles of the rich and famous.

There is also a lot of talk these days about "paper entrepreneurship," or investment in ownership and control of existing corporate assets, rather than investments in new business ventures that augment jobs and production. A company worth $50 million last year is worth twice maybe

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three times as much this year because it levered the purchase of a much larger company.

Now, I'm not saying any of this is wrong, illegal, or even otherwise problematic. But, as you know, public perceptions form the political environment in which these kinds of issues will be considered.

Given what's going on, I think I would encourage our children to become intermediaries -- lawyers, accountants, brokers and the like. All this shuffling of paper spins off tremendous fees for the professionals involved in putting these deals together.

A billion-dollar company may be changing hands with no net economic gain or loss. But those on both sides of the deal are paying large professional fees to make it happen. Again, there's nothing wrong with that. It does, however, raise questions and speculation about what it all means for the public.

If you look at all of these issues against the political and economic backdrop of the 1980s, there is cause for legitimate public concern. Not so long ago, Canada went through a real economic downturn that cost millions of jobs, escalated the federal government's deficit, and almost decimated regional economies. While times have changed and economic indicators are pointing in the right direction, the memory of the early part of this decade lingers.

As a result, Canadians are conditioned to be somewhat fearful of any economic or business relationships they may not fully understand.

Those fears are raised whenever there are conflict-of-interest allegations against public officials. It doesn't matter whether those charges are well-founded, whether they focus on public servants or politicians, or whether they're in the municipal, provincial or federal jurisdictions.

Well, corporate takeover activities and businessmen are often viewed in a similar emotional environment.

I can tell you one thing: An emotion-charged debate will sometimes force a government to act in haste to resolve those pressures which exist when the public believes its interests are threatened. It's not the best way to solve a problem, especially when no one is even sure what the problem is.

If action is forced before we even have a rational debate of the issues, the subsequent public discussion will be based upon limited facts, unlimited speculation, and political advantage. So, we must make the debate more deliberate and focussed; we must address the real issues rather than succumb to political rhetoric.

How do we do this? Well, I'm not prepared to offer you a ready-made government policy. I'm here to tell you that we must reduce the emotionalism so we can deal with the real issues.

Conceptually, I think there are about six different areas around which the debate on corporate concentration should focus. I would like to restrict my discussion to the following categories:

- competition
- the governing of corporations
- financial versus non-financial corporations
- economic performance
- distribution of wealth, and
- government/business relationships

I confess that what I have to contribute today are not answers, but questions. If we can get the questions right, then we have a much better chance to find the answers. This is important because if we miss the right questions, who knows where we will end up?

The questions I'm going to throw at you do not come in any policy order or any political framework. They are just questions that are thrown on the table when corporate concentration is discussed.

The first is competition.

Competition is probably the most volatile emotional issue in the entire debate. High levels of corporate concentration often seem to be equated with a lack of competition.

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This issue has several dimensions. All takeovers do not reduce competition. The question at hand is what indicators does one use to determine which takeovers do reduce competition. Corporate concentration in a particular market may increase as the result of an acquisition. But that may make the new competitor more vigorous and efficient. Concentration is an important factor but not the only factor by which one must judge competition. Freedom for new firms to enter and/or small and medium size companies to grow into a particular line of business, range of choice and price of products and imports are among the host of factors that must also be considered. Besides, competition relates to markets and the concern that seems to be driving the public debate more often these days is a concern over the absolute size of a corporation.

Yet, as I look at this issue from my perspective as Minister of Consumer and Corporate Affairs, if we are to advance the public debate we must begin by distinguishing between competition issues specifically, and the problems of increasing corporate concentration.

A question that needs to be asked is: What is the relationship between concentration in corporate ownership -- with one company owning dairy companies, real estate firms, car rental companies, breweries and other organizations -- and brand-name market penetration, or price within a

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specific commodity area? I don't have the answer, though I know it's the question uppermost in people's minds when they address the issue of corporate concentration.

The second category to review is corporate governance.

How should corporations be governed in this atmosphere of takeovers? This raises questions of shareholders' rights, information disclosure, the responsibility of corporate directors and so on. The Canadian Tire situation put many of these issues squarely on the table -- though I'm not sure that the Canadian public really understood what was going on. The regulators, however, have made it clear that they will not look favourably upon companies who violate the rights of minority shareholders.

Government can move further in these areas with corporate and securities legislation. But that requires extensive understanding and cooperation by two levels of government in two different areas of legislation -- and that's only a small part of the issue. The issue of financial institutions is also an essential element in the discussion of corporate concentration.

The relationship between financial institutions and non-financial corporations raises many questions, some of which I alluded to earlier. My colleague Tom Hockin, Minister of State for Finance, has established some directions for the resolution of these issues.

In his paper, <u>New Directions for the Financial Sector</u>, Tom articulated four principles that the government should

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adopt to maintain a sound financial system -- a system that would provide Canadians with innovative, competitive and secure services. Integration of the industry, a pragmatic ownership policy, strength in the regulatory system and an effective, modern supervisory system are the basis for strong financial institutions that will best serve Canadian interests.

A fourth topic which must also be addressed is the macro issue of the impact of corporate concentration on economic performance.

Do takeovers, large or small, contribute to economic growth? Put the other way, do they diminish economic growth? But I suspect the answer is -- it depends. The money paid out for an acquisition likely won't add new jobs to the Canadian economy -- except maybe for lawyers and other intermediaries. Nor does it necessarily improve the competitive performance of the company that was taken over.

But what about the people who used to own the company and who suddenly have more cash to invest? What do they do with that investment capital? And how do their decisions impact on job opportunities and entrepreneurship? I don't have these answers either. But there must be some economic benefit from that infusion of unattached capital.

Even if those benefits can be demonstrated, we don't know the economic impact on firms that have been the target

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of takeovers -- the impact in terms of efficiency, effectiveness or risk-taking in the private-sector environment.

More importantly, when very large players in the economy make bad economic decisions -- or mistakes -- the effects do not just wash through the economy. Rather, because of their size they can have a significant effect on the performance of the Canadian economy. We can probably deal with all those elements through a combination of tax and monetary policies, sectoral policies, and corporations law. The problem is in orchestrating all of the legislative powers we have, if we only have a limited understanding of the problems we're trying to resolve.

I'm reminded of a group of Ontario business people who went to Montreal many years ago to plead the case of expanding passenger rail services before the executive of a major railway company. The Board of Directors took the intervention of these important business interests quite seriously, until the Chairman of the Board looked at his watch and asked the group: "How did you get here in time for this meeting?" The group replied, "We flew, of course," at which point the Chairman of the railway said, "Meeting adjourned, and thank you for coming. I hope you have a pleasant flight home."

The moral of that story, of course, is that it's not enough to just state your case; you must demonstrate it as well.

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Do these major corporate takeovers enrich the country or simply create a smaller and smaller corporate elite? And, does this elite have political power -- the ability to intervene with politicians and exert influence over policy -- that somehow subverts the democratic system?

In this arena, where public confidence in our democratic institutions is being challenged, the questions are clear. The answers, however, are clouded by political rhetoric, by short-term advantage, and by whatever ephemeral issues happen to occupy the headlines of the media.

The government is moving on a number of fronts to counter the emotional response. We are dealing with lobbyists, conflict-of-interest guidelines, divestiture of Crown corporations that no longer have overriding public policy imperatives, and other related policy issues. We are dealing with changes to the corporate and personal income tax systems.

We are looking at two potentially conflicting issues simultaneously -- encouraging investment and entrepreneurship on the one hand, and preserving and enhancing the social safety net on the other -- all this while trying to maintain the integrity of the political process.

I suggested earlier that the issue of corporate concentration can be examined conceptually by reducing it to six different issues, all of which have an impact on our economic, social and political traditions.

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While the government has moved to resolve many of these issues independently, it will not necessarily ease the public's concern over the generic issue of corporate concentration.

That's why more disciplined thought -- public, corporate and government -- must take place to ease the public mind, while at the same time ensuring an effective environment for Canadian business nationally and internationally.

I don't want this discussion to be controlled by those scaring the Canadian public for political advantage. I don't want to be forced to develop legislation to respond to issues that are driven by emotion rather than careful reasoning. I don't want to propose solutions to Cabinet before we really understand the problems.

Maybe the public perceptions about the evils of corporate concentration are valid. But what I want, and what you can help me with, is deliberate thought on the issues. What you can do is understand where public concern is coming from, and help mould the debate from one of 'hysteria' to one of 'deliberation.'

The concepts I've outlined today are just <u>one</u> way of looking at these issues.

For instance, I haven't talked about Canada's ability to compete in the international marketplace. I haven't talked about the environment of freer trade relationships with the United States, or how the European Economic Community is defining many international trade issues.

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As you contemplate the questions I have put forth today, I want to remind you again that the government has already undertaken several initiatives which touch on the issue of corporate concentration. The Competition Act, in its first full year of implementation, will go a long way toward ensuring healthy competition in the marketplace. It had been on the public policy agenda for a long time. But we got the job done. Tom Hockin's proposals which have been designed to strengthen our financial system, steps toward privatization, our plans for comprehensive tax reform; and our response to the registration of lobbyists also will all address the subject of a fair and open marketplace and political system.

I believe we have a policy and legislative framework in place that allows business to do what it does best -- business. I encourage and welcome your input on our efforts thus far and your thoughts on emerging issues such as corporate concentration. Policy formulation is an ongoing process and you are an integral part of that process. I look forward to our work together.

Thank you.

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Speech

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

S-87-9

Corporate Concentration and Canada's

New Competition Act

Notes for an Address

to the

National Conference on Mergers, Corporate Concentration, and Corporate Power in Canada

by

Calvin S. Goldman

Director of Investigation and Research, Competition Act

and

Assistant Deputy Minister

Bureau of Competition Policy

Consumer and Corporate Affairs Canada

Montreal, March 24, 1987

Canada

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Introduction

It is a great pleasure for me to be here with you today, as the issues which are being discussed at this conference are clearly of significance for all Canadians. I would like to share with you today some of my thoughts on the new Competition Act, which was enacted by Parliament on June 19, 1986, and particularly as it relates to the issue of corporate concentration. But, before I do this, I would like to mention at the outset that it is important to distinguish between the different dimensions of corporate concentration. In yesterday's opening session, Shyam Khemani described the various concepts and inter-relationships between aggregate concentration, industry or market concentration, ownership concentration and conglomeration of financial and non-financial companies.

The type of corporate concentration that is most directly of concern to the Competition Act is industry or market concentration. This measure of concentration can influence the nature and extent of competition in a market since it relates to the number and size of competitors in a market.

The Competition Act is primarily concerned with competition in markets. In what follows I will describe the major provisions of the Act that impact on the structure and

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conduct of firms in a given market. However, over time, the enforcement of competition law may also have an indirect effect on aggregate concentration in the economy as a whole and, to some extent, on the concentration of ownership. In my view, the vigorous application of competition policy can contribute significantly towards alleviating many of the concerns that often arise from different dimensions of corporate concentration, even though competition policy operates primarily in relation to market concentration. I believe that many of the concerns associated with high levels of corporate concentration can be traced back to the extent to which competition prevails in given markets.

In my presentation I would like to first describe, briefly, the basic objectives of competition policy and relate these objectives to the constraints imposed by the structural characteristics of the Canadian economy. I will then discuss the administrative machinery established for the implementation of competition policy. Following this, I will highlight the merger, specialization agreement, abuse of dominant market position and other provisions of the Competition Act. In doing so, I will also discuss my initial experience over the past nine months in administering this new legislation. Finally, I will present some concluding remarks on what I perceive to lie ahead for the state of competition in Canada.

Objectives of the Canadian Competition Act

The purpose clause of the Competition Act is new and it now states:

> "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."

These objectives will generally be considered in the adjudicative process when cases are brought before the newly established Competition Tribunal, which I will be describing shortly, or the courts. There are also a number of underlying principles that thread together the various provisions of the new Competition Act which can be summarized as follows. First and foremost, the Competition Act is a general law of general application. It is a framework legislation which seeks to maintain and strengthen the role of market forces thereby encouraging maximum efficiency in the use of our economic resources. Second, the law recognizes the important role international trade plays in exerting competitive pressures in the domestic economy as

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well as providing export opportunities for Canadian firms. Third, large firm size is not necessarily viewed as being adverse to competition. In some instances, increases in size may be necessary to achieve economic efficiency in order to effectively meet domestic and foreign competition. It is not the size of a firm that is the primary concern under the Act, but rather the use and abuse by a firm of its market power. Fourth, where large firm size is necessary for the attainment of efficiency, the efficiency gains should be counterbalanced with the impact on competition. This theme flows through the merger, specialization agreement and abuse of dominant position provisions of the new Act. Fifth, the Act seeks to establish a clear and equitable set of standards -- standards which are also effective and enforceable -- by which businesses are to conduct themselves in the marketplace. These standards are aimed at preventing abuses of market power, ensuring firms compete with one another on a fair basis and providing consumers with product and quality choices at the lowest prices possible.

The approach adopted in the Competition Act places it squarely in line with the unique needs of the Canadian economy. There are several characteristics of the Canadian economy, which when taken together, present a complex configuration in which competition policy must operate. The characteristics I have in mind here are:

1) Small size of domestic markets relative to efficient scale of production which imposes cost disadvantages on firms competing in international markets.
2) An open economy in which international trade plays an important role but, nonetheless, is still characterized by protective measures.
3) High levels of market concentration and oligopolistic structure of many industries.
4) Geographically segmented markets.

These structural characteristics of the Canadian economy dictate that competition policy should have regard to the efficient allocation of resources rather than simply promoting competition for competition's sake. Competition is not an end in itself. It should be viewed as a vehicle to promote economic efficiency and the other objectives referred to in section 1.1 of the Act.

Efficiency considerations may often result in firms of large size and higher levels of concentration. This is not to imply that "bigness" is necessarily synonymous with efficiency. But in cases where efficiency requires firms to be of relative large size, it is not intended that competition law penalize or act as an impediment to the achievement of that size. The Act explicitly recognizes the need to facilitate the transition of firms to become world-class competitors. The new competition law seeks to balance

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competition-related concerns with efficiency considerations while at the same time facilitating the ability of firms to adapt to changing market circumstances.

The provisions of the Competition Act are designed to foster a flexible, dynamic and innovative market environment. Such an environment dampens, if not eliminates, tendencies some large firms may otherwise have to exercise market power and engage in anticompetitive practices. High levels of corporate concentration become a major concern when markets are not contestable, that is, when incumbent firms are entrenched in their respective markets and are insulated from the competitive process by regulatory and structural factors. Thus the Competition Act is designed to ensure markets perform their proper function in signalling the flow of economic resources from less to more valuable uses and by rewarding innovative and efficient firms.

Administration of Competition Policy

The Competition Act is the principal piece of legislation in the administration of competition policy in Canada. However, like other Western industrial countries, Canada has additional economic policy instruments such as government regulation, tariffs and tax policy, which influence the structure, conduct and performance of various sectors of the economy.

Therefore, in the administration of competition policy, a dual set of responsibilities have been assigned to me. First, as the Director of Investigation and Research, my primary responsibility is to enforce the provisions of the Competition Act. Second, I am also Assistant Deputy Minister, Bureau of Competition Policy, within the federal Department of Consumer and Corporate Affairs. In this latter role I try to ensure that competition-related concerns are fully considered in the formulation of various aspects of government policy.

The Act contains specific provisions which give rise to inquiries by my Office and perhaps subsequent proceedings, within the framework of the criminal law in certain instances of offences such as conspiracy and predatory pricing, and within the framework of administrative law in respect of reviewable matters including mergers and abuse of dominant position.

I will not delve into details of the organizational and administrative principles underlying the enforcement of the Competition Act. I would, however, like to briefly mention that inquiries under the Competition Act can be initiated in a number of ways. The Director may initiate an inquiry on his own accord if he has reason to believe that an infraction of the Act has or is about to be committed. The Director shall also initiate an inquiry, if there exist the necessary grounds, on receipt of a complaint from six

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persons resident in Canada of not less than 18 years of age or on direction from the Minister. The Director on discontinuing any inquiry must make a report in writing to the Minister, and in cases of a six-resident complaint, to the applicants, informing them of the reasons for his decision. Provisions exist for the Minister to review any decision and instruct the Director to make further inquiry.

Concurrent with the passage of the Competition Act, Parliament also enacted the Competition Tribunal Act. This latter piece of legislation establishes the Competition Tribunal, a unique Canadian institution, which brings together both judicial and lay expertise, to adjudicate cases brought before it by the Director. Membership of the Tribunal includes four judicial members and up to eight lay members who may have extensive expertise and background in economics, industry, commerce or public affairs. The specialized nature of the Tribunal provides the greatest potential for developing expertise in such complex issues as efficiency considerations and the effects of anticompetitive practices.

In an attempt to ensure its impartiality, the Tribunal has been structured purely as an adjudicative body, without any investigative functions. The Tribunal has no role in supervising the investigative powers of the Director, initiating investigations or providing research or policy advice to the government. Its jurisdiction extends solely to the civil reviewable matters contained in Part VII of the

Competition Act. The Tribunal is a court of record, and, with respect to such matters as the examination of witnesses and enforcement of its orders, it possesses the same powers as are vested in superior courts. Appeals from decisions of the Tribunal will be heard by the Federal Court of Appeal.

Provisions of the Act

I would now like to focus on some of the specific provisions of the new Competition Act and highlight how these provisions address the anticompetitive consequences of market power while maintaining sufficient flexibility to facilitate economic adjustment. In the first section I will describe the merger provisions which, as the theme of this conference suggests, form an important part of the phenomenon of corporate concentration. I will then go on to discuss in some detail the specialization agreement provisions and the abuse of dominance provisions as these too are relevant to the corporate concentration issue.

Mergers

I think it is fair to say that the most important and far-reaching reform brought about by the passage of the Competition Act is the new set of provisions dealing with mergers. The criminal law provisions under the previous

legislation, the Combines Investigation Act, proved to be totally ineffective and inappropriate to deal with potentially anticompetitive mergers. In the 75-year history of the law, the Crown laid charges in only eight cases. While the great majority of mergers are, on balance, neutral or likely beneficial to the economy, there is no doubt that some mergers are clearly anticompetitive. I am confident that the new merger provisions have given us the means to deal effectively with those mergers that are detrimental to competition.

One of the most important changes in the merger law is that it has moved from a criminal law to a non-criminal, administrative law environment. This change has a number of significant ramifications. First, the standard of proof on the Director has been changed from a criminal burden of proof -- the familiar "beyond a reasonable doubt" -- to a less onerous non-criminal standard. A non-criminal standard is clearly better suited to the examination of complex economic matters such as mergers, where a wide variety of factors and their effects has to be considered. Second, the reviewing body, the Competition Tribunal, will be composed of judges and, probably, experienced economists and business people who should be more familiar with assessing extensive economic or commercial data. Third, the administrative law provides greater scope and flexibility for introducing

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evidence, making submissions and granting remedial orders to maintain or restore competition. In the criminal law setting the judge is restricted to the use of fines, incarceration, orders of prohibition, or possibly a dissolution order. Finally, the non-criminal law environment promotes a more positive atmosphere for resolving competition-related problems raised by the merger. Parties to the merger are much more receptive to the voluntary presentation and discussion of their merger proposals, and are often more receptive to altering aspects of the transaction to alleviate our concerns than they were in the past.

The second major departure from the old merger law is that the basic test the Director must meet has been changed. The Competition Tribunal is now directed to consider the issue of the impact on competition of the merger instead of the more ambiguous standard of public detriment. As with other non-criminal provisions dealing with tied selling, exclusive dealing, market restriction and in the new abuse of dominant position provision, the Director must demonstrate that the merger "prevents or lessens or is likely to prevent or lessen competition substantially." To assist the Tribunal in its consideration of the arguments and evidence in relation to the substantial lessening of competition, the Act sets out a non-exhaustive list of factors that the Tribunal may consider it in its deliberations and decision.

The Act makes it clear that the Tribunal cannot find a substantial lessening based solely on the evidence of increased concentration as a result of the merger. This provision ensures that the assessment of mergers is more than a mechanical exercise of adding up market shares and that the Tribunal will consider the impact of both the quantitative and qualitative aspects in analyzing the impact of the merger. It is an explicit recognition of the fact that it is the substantial lessening of competition, not the size of the merged firms per se, that is of primary importance. Size of the firms by itself may tell you nothing about how rival firms compete in a particular market. Although market concentration will remain as an important factor in the merger assessment, the Director and the Tribunal will also have to address and consider many other factors such as barriers to entry, the extent of change and innovation, effective competition remaining, removal of a vigorous competitor, and the availability of acceptable substitutes in determining whether the merger prevents or lessens competition substantially in the relevant market. These and other factors are specifically enumerated in section 64 and section 65 of the Act.

The importance of foreign competition to the Canadian economy is highlighted by placing it at the outset of the factors to be considered in section 65. The second factor listed refers to the situation where a firm is failing and

about to exit the industry. These two factors reflect the desire of the designers of the Act to tailor it to the Canadian environment where international trade and economic readjustment are prominent features of the economic landscape.

It should be noted that the Tribunal may have regard to other factors which are not listed in section 65 in order to arrive at its assessment of the competitive impact of the merger. Other factors, such as the countervailing market power of buyers or the history of anticompetitive conduct of the merging parties, may be relevant to determining the competitive effects of the proposed merger. The factors actually taken into account by the Director and the Tribunal, and the weight given to each will, of course, vary with the circumstances of the case and the relevance of the particular factor to the merger in question. In most cases, no one factor will be decisive and all the factors will have to be weighed together to arrive at a conclusion on the competitive impact of the merger.

The third major departure from the former merger law is the explicit statutory recognition of efficiencies as an exception to the application of the merger law. The small size of the Canadian market and the diversified nature of production necessitates that efficiency considerations be explicitly accounted for in Canadian merger law. By incorporating an efficiency exception, the Act clearly recognizes

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that the restructuring of an industry can, in certain circumstances, result in net benefits for the economy, even though such a merger may result in higher levels of concentration.

The new merger law provides that the Tribunal shall refuse to prohibit a merger, even if the merger would lessen competition substantially, when the parties can satisfy the Tribunal that the merger will bring or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition resulting from the merger and that such efficiency gains would not likely be attained in other ways if the order prohibiting the merger were made.

Efficiency gains that may be relevant include economies of scale and scope, plant specialization, and lower transportation costs, among others. In most cases, these savings translate into lower unit output costs, and would likely qualify as efficiency gains under the efficiency exception. Whether such gains would override a lessening of competition is a question for the Tribunal to decide in the circumstances and particular facts of each case. It should be noted that costs savings that result from a mere redistribution of income as opposed to a real savings in resources are not considered by the Act to be efficiency gains. Tax savings associated with a merger, for example, are transfers from the general taxpayers to the merged firm and do not, in my view, qualify as efficiency gains.

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I understand that a somewhat similar recognition of efficiencies is currently being taken by the U.S. Department of Justice, and I'm told it is one of the more difficult tasks they have experienced in their merger analysis since sometimes competition-lessening "apples" have to be balanced against efficiency "oranges." Our initial experience over the last nine months reflects a similar challenge in undertaking this rather difficult balancing process, although we have not yet encountered a situation where efficiency gains have resulted in an "even weight" on the scales.

In addition to the efficiency exception, the Act provides in section 67 for a limited exemption for combinations that are joint ventures and which have been formed for the purpose of undertaking a specific project or a program of research and development. A special recognition of the value of joint ventures in the merger law is desirable because of the economic importance of joint ventures, particularly in the Canadian oil and gas industry, and their recent prominence in research and development programs and export consortia. The joint venture exemption, however, has been carefully drafted to ensure that anticompetitive joint ventures remain subject to the merger law and that parties do not have an incentive to restructure transactions to escape the law.

While it is not my intention to dwell on the procedural aspects of the merger law or on the merger prenotification

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provisions, I do want to highlight some important points. In most cases, the better time to challenge a potentially anticompetitive merger is before the proposal is completed. Once the parties have merged their assets and operations, it becomes more difficult to return the parties to their premerger position in the market. Without some form of prenotification, the Director's ability to make a preliminary assessment of the competitive impact of the merger, as well as his ability to take the necessary steps to stop an anticompetitive merger before it is consummated, would be seriously constrained. In drafting the prenotification provisions, a balance was struck between the Director's need for advanced knowledge and the desire of the parties to complete their deal with a minimum of bureaucratic delay and intervention. First, the prenotification provisions apply only to large transactions where the parties' combined assets or revenues exceed $400 million and the value of the acquisition itself exceeds $35 million in assets or revenues, except in the case of amalgamations where the transaction threshold is $70 million. Secondly, the waiting periods are short, ranging from 7 to 21 days. Finally, appropriate exemptions have been included that remove business transactions which would rarely, if ever, raise competition issues. While many mergers will not fall within the prenotification provisions, it should be noted that the

substantive merger law applies to all types of mergers, regardless of their size, and that the Director can challenge a merger up to three years after it is substantially complete, unless an advance ruling certificate has been issued, in which case section 75 of the Act governs.

If the Tribunal finds that the merger lessens or is likely to lessen competition substantially, it has a wide range of orders to choose from. In the case of a completed merger, it can order dissolution or disposal of certain assets or shares by the parties to the merger or any other person. In the case of a proposed merger, the Tribunal may order the parties not to proceed with all or part of the merger, or may prohibit the doing of certain acts or things if all or part of the merger proceeds. In either a proposed or a completed merger case, the Tribunal may also order the parties to take other action the Tribunal deems appropriate if the parties and the Director consent to the order.

As I mentioned earlier, one of the advantages of having the merger provisions removed from the criminal law environment is that it encourages business people to come forward at an early stage with their proposal to see if it will raise competition problems and, if so, to see if the deal can be restructured to remove those concerns. The difficulty and expense of "unscrambling the eggs" once the deal is done means that it is in the parties' best interest to come forward voluntarily before the transaction is

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completed. As a matter of policy, I certainly welcome opportunities to resolve these problems in a cost-effective and expeditious manner. It is my intention to make greater use of negotiated settlements in appropriate cases, particularly in the context of the merger and other administrative law provisions. In cases where a settlement or compliance with the Act is otherwise reached, it is likely that one of three vehicles will be employed: an advance ruling certificate, a compliance opinion, or a consent order.

If parties are confident that the merger will raise no competition issues but want greater certainty, they can ask for an advance ruling certificate. Section 74 of the Act provides for the issuance of a certificate by the Director where he is satisfied that he would not have sufficient grounds to apply to the Tribunal. The certificate precludes the Director from challenging the merger if it is substantially completed within one year after the certificate is issued and if there is no substantial change in the information upon which the certificate was based. I might add that a number of parties have already applied to my office for an advance ruling certificate. An advance ruling certificate may be issued with or without certain terms or undertakings by the purchaser, depending on the circumstances of the case.

Another avenue under which a proposed merger can be reviewed is through the Director's Program of Compliance. In one recent case, for example, the potential purchaser sought our views several months before approaching the vendor in order to ensure that once negotiations for purchase had begun, it would proceed quickly without any unpleasant surprises from the Office of the Director. In these early stages of planning, the Director can give a letter of opinion under the Program of Compliance which states whether or not a proposed transaction, based on the information before him, would cause him to initiate an inquiry under the Act. This letter will indicate where the Director's concerns, if any, may lie. If concerns are raised, and the party then satisfies those concerns, compliance with the Act can usually be achieved without the need for other proceedings. In some cases, we will prefer to give a "no issue" compliance opinion rather than an advance ruling certificate. This will allow the Bureau to monitor a situation which raises no immediate concern but, due to the changing state of the market or other factors, might still raise an issue within the three-year period in which the Director could challenge the merger or a portion of it.

A final mechanism for negotiated settlement is the consent order. Under section 77, the Tribunal may consider granting an order, whose terms have been agreed upon by the

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parties and the Director, without the necessity of going through a full, contested hearing. Consent orders are likely to be used where it is necessary to ensure enforceability of the terms of the agreement over a comparatively long period of time or where variation of the terms may prove necessary. It should be noted that the ultimate decision to grant a consent order rests with the Tribunal, while the authority for issuing an advance ruling certificate rests solely with the Director.

Before concluding my comments on mergers, I would like to point out that the initial experience we have with the new provision, although brief, is encouraging. Since last June, the Bureau has examined in a significant fashion, or is in the process of examining, over 30 merger-related matters. Twenty-one matters have been resolved, six by a program of compliance opinion, two by issuing an advance ruling certificate and 12 by closure because no significant competition concerns were ultimately raised. In one case the parties abandoned the merger as a result of Bureau action. In over one-half of the cases that gave rise to extensive examination, the parties have come forward voluntarily, sometimes well in advance of the public announcement of the transaction. As I indicated earlier, this is a practice I hope to foster and encourage. It should be noted that the Bureau, in addition to the 30-plus mergers mentioned, does a brief review of all mergers that come to

its attention from the press, from Investment Canada, or otherwise, to determine whether any possible competition issues may arise, so that in fact the number of mergers considered by the Bureau is well in excess of 30.

The recent merger wave that Canada and most other Western economies are experiencing certainly has raised concerns about rising corporate concentration and market power. The message I would like to leave you with is that for the first time Canada now has an effective merger law that applies to all types of mergers, be they horizontal, vertical or conglomerate. The merger provisions will be used to prevent those mergers that raise the greatest concern because of their detrimental impact on competition and the competitive process.

Specialization Agreements

As I mentioned at the outset of my remarks, one of the structural characteristics of many Canadian industries is that plants are of suboptimal size and have multiple product lines. When parties are considering merger candidates, they often look for partners that will provide opportunities to rationalize production and increase scale and other economies. I would now like to focus on the specialization agreement provisions of the Competition Act which also allow firms to reorganize production and enjoy efficiency gains made possible from longer production runs.

Section 57 of the Act defines a specialization agreement as an agreement where each party agrees to discontinue producing an article or service on the condition that each other party agrees to discontinue producing an article or service. Parties may apply, on notice to the Director, to the Tribunal for an order to register the agreement. Registration provides an exemption from the conspiracy and exclusive dealing sections of the Act.

The Tribunal will register a specialization agreement, however, only if the parties have demonstrated that the agreement is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result. Like the efficiency exception in the merger law, it must also be shown that the gains in efficiency could not be achieved by other means, such as the unilateral specialization of product lines by the firm.

The Tribunal may make the order conditional upon such things as a wider licensing of patents, a reduction in tariffs, a removal of import quotas or a partial divestiture of assets, if the Tribunal is satisfied that the agreement will produce efficiency gains that offset the lessening of competition but that there will be no substantial competition remaining in the market if the agreement is registered. The Tribunal can set out in its order the period of time that the order of registration will be in

force. The Director may make an application to the Tribunal to remove the registration if the conditions of registration contained in the section are no longer met.

Abuse of Dominance

In addition to the merger and specialization agreement provisions, a further major reform brought in with the Competition Act was the replacement of the criminal offense of monopoly with an administrative provision relating to the abuse of a dominant position. The criminal monopoly provisions, like the criminal merger law, proved to be ineffective. The transition to the administrative law environment should improve the successful application of the provision, given the less onerous standard of proof and more specialized expertise of the Competition Tribunal.

As I indicated earlier, the new Act recognizes the fact that large size may be desirable in order to obtain the economics of scale necessary to compete against foreign producers both in Canada and abroad. High concentration or dominance of a particular market is not, in and of itself, a concern of the Act. What becomes objectionable, however, is when the dominant firm uses its market power in an abusive fashion to protect or extend its dominant position, thus damaging the competitive process which ensures that all producers in the market are seeking to meet consumer demands

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at the lowest possible cost. It is the conduct of the dominant firm that becomes the subject of examination under section 51 of the Act.

Under section 51, the first requirement of a dominant position is obtained when one or more firms substantially or completely control a class or species of business. The term "one or more persons" captures the notion of joint or shared dominance, a concept that has been considered in the Canadian Large Lamps* case. While it will be up to the Competition Tribunal to give us further guidance on the application of the shared dominance concept, I would like to point out that section 51 is not intended to be a civil conspiracy law.

The usual starting point for determining whether a firm substantially or completely controls a class or species of business will be its share of the relevant market. If high concentration is found to exist, then further examination is required to determine why concentration is high and if it

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* In R.v. Canadian General Electric Co. Ltd. (1976) 29 C.P.R. (2d)1, 15 O.R.(2d)360, Canadian General Electric, Westinghouse Canada and G.T.E. Sylvania Canada Ltd. were charged with operating a shared monopoly to the detriment of the public and with conspiracy. The accused were convicted of conspiracy and acquitted of the monopoly charge. While the judge in this case acknowledged that the words of the old monopoly section of "one or more persons" could embrace a situation of shared monopoly, he did not elaborate further on what would be required to show a shared monopoly, such as an agreement among the firms or a long history of conscious parallelism.

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will remain so in the future. Key points to consider in this analysis include the ease of entry, foreign or potential competition, availability of substitutes and changes in technology. Like mergers, the application of the abuse of dominance provisions will require more than a mechanistic approach based solely on the levels of concentration in the relevant market.

The second requirement to be proven under section 51 is that the dominant firm or firms have engaged in a practice of anticompetitive acts. Section 50 provides a non-exhaustive list of anticompetitive acts. The specified acts include the acquisition of a customer or supplier for the purpose of impeding entry, vertical squeezing of an unintegrated customer, the use of fighting brands to discipline a competitor, and the pre-emption of scarce facilities or resources required by a competitor. The list is non-exhaustive so that acts of like character can be held to be anticompetitive by the Tribunal. All of the listed acts require consideration of the exclusionary purpose, object or design of the dominant firm to ensure that the censured conduct is not the product of reasonable competitive behaviour. It also should be noted that the firm must make a practice of the anticompetitive act and that an isolated act or temporary expedient is unlikely to constitute a practice.

The third requirement to be proven under section 51 is that the practice has had, is having, or is likely to have

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the effect of preventing or lessening competition substantially in a market. To answer this question, the Director and Tribunal must consider both the dynamic and static effects of the practice in terms of its impact on ease of entry, potential competition, product innovation, pricing and so on. An increase in market concentration, in and of itself, will not be sufficient to establish a substantial lessening of competition.

In determining whether the practice has had the effect of lessening competition substantially, the Act directs the Tribunal in subsection 51(4) to consider whether the practice is a result of superior competitive performance. If competitors leave the market or lose market share because a competitor is simply more efficient than its rivals or is more effective in meeting consumer needs, the lessening of competition does not result from an abuse of market power, but rather it is a natural consequence of the competitive process. Subsection 51(4), therefore, is included in the Act to ensure that efficiency, innovation and like considerations are given proper weight by the Tribunal in its assessment of the trade practices of a dominant firm or firms.

The Tribunal has a number of remedial orders to choose from in redressing a situation where an abuse of dominance has been found. The most commonly invoked order will likely be an order prohibiting the firm from continuing to engage

in the practice of anti-competitive acts. If an order of prohibition is not sufficient to restore competition, the Tribunal may make an order directing such actions, including the divestiture of assets or shares, as are reasonable and necessary to overcome the effects of the practice in the market.

In considering the problems raised by rising corporate concentration, it should be kept in mind that most concerns arise when a firm has market power in a particular market and has the ability to abuse that power. It is not market power *per se* that harms the economy, but rather it is the abuse of that market power by those who enjoy it that impairs the free-market system. The abuse of dominance provision has been designed to focus on and remedy these type of problems.

Other Provisions of the Act

Time does not permit me to discuss many other provisions of the new Competition Act, but I would like to draw your attention to some of the important changes in the law. There have been a number of amendments to clarify and strengthen the criminal conspiracy provisions. A new subsection states that the existence of an agreement to lessen competition may be proven from circumstantial evidence with or without direct evidence of communication between the

parties. Another subsection makes it clear that the Crown must only prove that the parties intended to enter into the agreement, not that the parties intended to lessen competition unduly when they entered into the agreement. The maximum fine has been increased from $1 million to $10 million. Finally, the export exemption to the conspiracy section has also been clarified and expanded so that it will be easier for firms to use export agreements to compete in global markets.

The new Act also expands the application of the law for the first time to Crown corporations and banks. In the Eldorado Nuclear case, the Supreme Court of Canada held that agent Crown corporations are not subject to competition law when effecting Crown purposes. The Act removes this exemption so that all agent Crown corporations when engaged in commercial activity in competition with private-sector firms must play by the same set of rules. In addition, the responsibility for investigating bank mergers and agreements has been transferred to the Director from the Inspector General of Banks. The Minister of Finance, however, has the power to exempt bank mergers or agreements from the application of the Act when he certifies they are desirable in the interest of the financial system or financial policy.

In addition to the enforcement provisions, I should also mention that another role of the Director that is taking on increasing importance relates to the regulated

sector of the economy. The Act explicitly authorizes the Director to intervene before federal regulatory boards or commissions to ensure competition policy issues are considered in the formulation of regulatory decisions or policy. The Director, in this capacity, has made numerous representations in both federal and provincial forums on such diverse matters as regulation and deregulation of financial, energy, transportation and broadcasting markets, as well as providing input on the privatization of Crown corporations.

These other provisions, as well as the new law on mergers, specialization agreements and abuse of dominance which I have described, have been carefully designed to achieve the goals of competition policy while, at the same time, recognizing and accommodating the need for economic adjustment and change in the Canadian economy. The new provisions are flexible instruments that acknowledge the need for large-scale, efficient Canadian producers who can compete effectively in domestic and international markets. The Act, however, also responds to the concerns raised by rising corporate concentration by adding or amending existing provisions that will prevent the use or abuse of market power in specific markets for anticompetitive purposes.

Conclusion

In my concluding remarks I would like to briefly mention that in Canada there are taking place, or about to take place, major structural developments which bode well for the state of competition and which also serve to lessen the concerns regarding corporate concentration. Major changes in regulatory policy in the transportation, energy and telecommunication sectors have already taken place and the pace of change is likely to continue. Major pro-competition reforms in the financial sector are currently being actively discussed. Changes in the Investment Canada Act have lowered the restrictions on foreign investment and entry of foreign firms. The average level of Canadian tariffs has been declining, partly as a result of the GATT-Tokyo Round agreements, and as a consequence, there is a healthy injection of import competition in many concentrated industries. The prospect for freer trade with the United States further increases optimism for increased competition in concentrated domestic markets. In addition, new technology has been eroding the cost disadvantages many Canadian companies have traditionally experienced. Public sector holdings are also becoming more exposed to market forces. In the last year, more than $800 million of Crown Corporation assets have been privatized -- and winning bidder firms include comparatively small firms such as Memotec's acquisition of Teleglobe.

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I mention these events as evidence of the dynamic change that is occurring in many important sectors of the Canadian economy. Such change has to be kept in sight when discussing issues of corporate concentration.

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Speech

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

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Notes for an Address

to the

Gordon Group Conference

on the Competition Act

by

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and

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Consumer and Corporate Affairs Canada

Toronto, March 31, 1987

Canada

Check against delivery

Introduction

I am pleased to have the opportunity to be with you today to discuss the subject of the new Competition Act, which was enacted by Parliament on June 19, 1986.

To commence today's discussion, I will provide you with an overview of the goals of the new Competition Act and of the administration of competition policy. I will then present a very brief description of the more significant provisions of the new Act. In this way I hope to lay the groundwork for the distinguished speakers to follow. As the Act has now been in place for nine months, I would also like to take this opportunity to share with you some of our recent experiences and initiatives in administering the provisions of the Competition Act.

At the outset I should point out that the new Competition Act, which has come into force after prolonged debate and a thorough consultative process, is a carefully designed piece of legislation. It is aimed at providing a framework in which business may be conducted competitively and equitably in the marketplace, while encouraging efficiency, flexibility and adaptability of the Canadian economy.

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Objectives of Canadian Competition Law

For the first time, a purpose clause has been included in the Act which provides a general framework for the entire legislation. It states:

> "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."

These objectives will generally be considered in the adjudicative process when cases are brought before the newly established Competition Tribunal, which I will be describing shortly, or the courts. There are also a number of underlying principles that thread together the various provisions of the new Competition Act which can be summarized as follows: First and foremost, the Competition Act is a general law of general application. It is framework legislation which seeks to maintain and strengthen the role of market forces, thereby encouraging maximum efficiency in the use of our economic resources. Second, the law recognizes the important role international trade plays in exerting competitive pressure in the domestic economy, as well as

providing export opportunities for Canadian firms. Third, large firm size is not necessarily viewed as being adverse to competition. In some instances, increases in size may be necessary to achieve economic efficiency in order to effectively meet domestic and foreign competition. It is not the size of a firm per se that is the primary concern under the Act, but rather the use and abuse by a firm of its market power. Fourth, where large firm size is necessary for the attainment of efficiency, the efficiency gains should be counterbalanced with the impact on competition. This theme flows through the merger, specialization agreement and abuse of dominance provisions of the new Act. Fifth, the Act seeks to establish a clear and equitable set of standards -- standards which are also effective and enforceable -- by which businesses are to conduct themselves in the marketplace. These standards are aimed at preventing abuses of market power, ensuring firms compete with one another on a fair basis to provide consumers with product and quality choices at the lowest possible prices.

The themes set out in the purpose clause -- efficiency, adaptability, and international competitiveness -- are a reflection of the desire of the Act's designers to tailor it to the unique needs and characteristics of the Canadian economy. Small and geographically segmented markets often lead to high levels of market concentration. However, despite their large size relative to the domestic market,

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many Canadian companies are still too small to achieve efficient scale or production and therefore find it difficult to compete with foreign firms at home and abroad. In addition, Canada is a relatively open economy and international competition can play a key role in some non-competitive markets which are dominated by one or two domestic firms. These structural characteristics of the Canadian economy dictate that competition policy should have regard to the efficient allocation of resources and industry performance rather than simply promoting competition for competition's sake alone. Competition should be viewed as a vehicle to promote economic efficiency and the other objectives referred to in section 1.1 of the Act.

Consumers and small-to-medium sized business are among the prime beneficiaries of an effective competition law. Anticompetitive conduct that increases prices and restricts output or the number of competitors, or otherwise restrains or injures competition, clearly can have a very damaging effect on existing small businesses, new entrants and consumers. The new legislation should now ensure that equitable practices and conduct are adopted or maintained in the marketplace.

Administration of Competition Act

Before turning to the major revisions to the Competition Act, I would like to give you a brief overview of the

enforcement and adjudication process under the Act. Most cases start from complaints made by the public, usually industry participants with a direct interest in the issue as a customer, supplier or competitor. Once the Director receives a complaint, or decides on his own initiative to investigate a situation, an examination is undertaken to see if there is "reason to believe" that an offence has been committed or that grounds exist for the Competition Tribunal to make an order. If this "reason to believe" threshold is met, then section 8 of the Act requires the Director to initiate an inquiry into all such matters as he considers necessary in order to determine the facts. Once the Director is on inquiry, he can apply to the courts for the use of a variety of investigative powers, including the power to search and seize, to require written returns of information, and to compel oral testimony or production of documents at a hearing.

At any stage in an inquiry the Director may discontinue the inquiry, or he may refer the matter, along with the evidence gathered, to the Attorney-General of Canada for his consideration as to whether an offence has been committed. In the context of the non-criminal, administrative law provisions, the Director may make an application to the Competition Tribunal for an appropriate order. Once the matter has been referred to the Attorney-General or an application made to the Tribunal, the investigatory phase

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is essentially over. In criminal cases, the Attorney-General retains the discretion to decide whether to prosecute, but in the case of an administrative law matter, it is up to the Director to decide whether or not to make an application to the Tribunal. Apart from cases involving specialization agreements, only the Director can initiate a proceeding before the Tribunal, although once he has brought an application, private persons may apply to the Tribunal for intervenor status.

The Competition Tribunal is a new adjudicative body composed of four Federal Court judges and up to eight non-judicial members. The concept behind having judicial and non-judicial members is to ensure impartiality and due process while at the same time have adjudicators who are very familiar with the applicable disciplines such as commerce and economics.

To reinforce its impartiality, the Tribunal has no role in supervising the investigative powers of the Director or providing research or policy advice to the Government. Its jurisdiction extends solely to non-criminal reviewable matters, such as mergers, abuse of dominance and exclusive dealing, which are contained in Part VII of the Competition Act. (As I see by the agenda that one of the judicial members, the Honourable Mr. Justice Strayer, will be addressing you this afternoon on the new Competition Tribunal, I will let him fill you in on the details of the mandate and workings of the Tribunal.)

Overview of Major Revisions to the Competition Act

As I mentioned earlier, it is not my intention to discuss in detail the various provisions of the new Competition Act. I would like, however, to highlight some points about the major reforms in order to prepare the foundation for the detail to come.

In June of last year Parliament made two fundamental changes to the law on competition. It gave Canada, for the first time, comprehensive and effective provisions covering mergers and abuse of dominance situations which substantially lessen competition. Second, it created a new adjudicative body, the Competition Tribunal.

In addition to these major reforms, the new Act incorporates a number of other important changes to the law to expand the scope of competition law and increase its effectiveness. There have been amendments which clarify and strengthen the criminal conspiracy provisions. A new subsection states that the existence of an agreement to lessen competition may be proven from circumstantial evidence without direct evidence of communication between the parties. Another subsection makes it clear that the Crown need not prove that parties intended to lessen competition unduly, only that they intended to enter into an agreement, which, if put into effect, would unduly lessen competition. These two changes were necessary to restate

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the principles firmly established in the earlier conspiracy jurisprudence and remove some uncertainty that arose from interpretations of the Atlantic Sugar and Aetna Insurance cases. In the new Act, Parliament has indicated the seriousness of this crime by increasing the maximum fine from $1 million to $10 million per count. Finally, the export exemption to the conspiracy section has also been clarified and expanded so that it will be easier for Canadian firms to use export agreements to compete in global markets.

Another important change is the expansion of competition law, for the first time, to include Crown corporations and banks. In the Eldorado Nuclear case, the Supreme Court of Canada held that agent Crown corporations are not subject to competition law when effecting Crown purposes. As a result of this finding, two of the six firms charged with violating the conspiracy provision of the Act in that case could not be prosecuted because they were Crown corporations. The Act removes this exemption so that all agent Crown corporations when engaged in commercial activity in competition with private-sector firms must play by the same set of rules. Coverage of the Act has also been expanded by transferring the responsibility for investigating bank mergers and agreements from the Inspector General of Banks to the Director. The Minister of Finance, however, has the power to exempt bank mergers or agreements

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from the application of the Act when he certifies they are desirable in the interest of the financial system or financial policy.

In addition to the merger and abuse of dominance provisions, a new non-criminal provision covering delivered pricing was also created. If delivered or zone pricing becomes widespread in an industry or is practiced by firms with considerable market power, customers may find that they have no alternative but to pay a freight charge included in the supplier's price which bears no resemblance to the transportation charges customers would actually pay if they could arrange their own delivery. Such pricing practices also increase the probability of collusion among competitors by allowing for uniformity in delivered prices to customers. Consequently, the new provision empowers the Tribunal to prohibit delivered pricing under certain circumstances.

A final area of reform concerns the procedural provisions of the Act. As a result of several cases brought under the Canadian Charter of Rights and Freedoms, the search power contained in the former competition legislation was declared unconstitutional. In <u>Southam</u>, the Supreme Court of Canada found that the former search provisions did not contain the same safeguards against unreasonable search and seizure as those which are contained in the Criminal Code. Their Lordships noted that the body empowered to

authorize the search was not sufficiently impartial because it also had investigative functions. To address these concerns, the investigative provisions of the new Act have been redrafted to ensure conformity with the Charter. Only judges of the Federal Court or judges of superior, county or district courts are now authorized to supervise the exercise of any investigative power. To safeguard the impartiality of the Competition Tribunal as well as the integrity of an inquiry, the Director, as a matter of policy, will not make application for any investigative power to those judges of the Federal Court who are also members of the Tribunal. The new search provisions parallel the standards referred to in Southam and set out in section 443 of the Criminal Code. Before a search warrant can be obtained, a judge must be satisfied by information on oath or affirmation and on reasonable grounds that one of the requisite criteria for commencement of an inquiry under subsection 8(1)(b) of the Competition Act has been met, that the records or things to be searched for will be found on the named premises, and that these records or things will afford evidence of the matter under inquiry.

To keep pace with technology, the Act also contains for the first time a section that authorizes the search of computer systems. The new provision permits the Director's representative to gain access to company data stored at a location off the search premises, such as a service bureau

or the head office of a corporation. In most past cases, the search team and company officials have worked out an operating procedure that ensures the search progresses in an orderly fashion without undue interference to normal business operations. I anticipate that searches which include the search of computer systems will be no different. In those cases where agreement cannot be reached, however, the Act provides for the Director or the parties involved to make an application to a judge to establish the terms and conditions of the computer search.

The power to compel oral testimony or production of documents has been continued from the former Act, with the major difference being that judicial authorization is required instead of an order from the Restrictive Trade Practices Commission. It should be noted that an order for production of records now explicitly includes records in the possession of an affiliate, whether the affiliate is located in Canada or outside Canada.

One further point about the revisions to the investigative provisions, which should be of particular interest to the lawyers in today's audience, is the fact that a procedure for claiming solicitor-client privilege has been codified in the Act. It is also worth noting that the confidentiality provisions of the Act have been strengthened and anyone working in the Bureau cannot communicate certain types of non-public information gained in the course of

administering or enforcing the Act, except in accordance with section 27 of the Act.

Mergers, Specialization Agreements, Abuse of Dominance

1. Mergers

I would like to make a few additional comments on the merger, specialization agreement and abuse of dominance provisions. I think it is fair to say that the most important and far-reaching reform brought about by the passage of the Competition Act is the new law dealing with mergers. The criminal merger law under the Combines Investigation Act proved to be totally ineffective. In the 75-year history of the previous merger law, the Crown was able to bring only eight cases to court, seven of which resulted in acquittal. A major reason for this lack of success was the fact that the merger law was placed in the criminal law environment. To correct this deficiency, the new merger law has been changed to a non-criminal law setting. This change has a number of important ramifications. First, the standard of proof to be met by the Director has been changed from a criminal burden of proof -- the familiar "beyond a reasonable doubt" -- to a less onerous non-criminal standard. A non-criminal standard is clearly better suited to the examination of complex economic matters, such as mergers, where a wide variety of factors and their effects has to be

considered. Second, the new reviewing body, the Competition Tribunal, will be composed of judges and, probably, experienced economists and business people who will be familiar with assessing extensive economic or commercial data. Third, the administrative law provides greater scope for introducing evidence, hearing submissions, or making remedial orders to maintain or restore competition. Finally, the administrative law environment promotes a more positive atmosphere for resolving competition-related problems raised by the merger. Parties to the merger are much more receptive to the voluntary presentation and discussion of their merger proposals, and are often more receptive to altering aspects of the transaction to alleviate our concerns than they were in the past.

A simple switch to administrative law, however, would not significantly improve the substantive nature of the former merger law. The Canadian economy is relatively small and becoming increasingly open to import competition. In some industries, firms may have to merge to achieve economies of scale and other efficiencies already experienced by their larger foreign rivals. On the other hand, many industries in Canada are not subject to the discipline of foreign rivals, and a merger in these markets could unnecessarily eliminate or reduce the number of producers and may lead to a lessening of competition.

Therefore, the new merger law no longer requires proof of detriment to the public but rather adopts a test of

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substantial lessening of competition which takes into account a broad range of factors, such as foreign competition, barriers to entry, availability of substitutes, extent of change and innovation, and the effective competition remaining after the merger. In coming to a determination of whether or not the merger substantially lessens competition, the Tribunal is directed by the Act to consider these factors, among others. It should be noted that the Tribunal is not permitted to find that a merger substantially lessens competition solely on the basis of evidence of market share or concentration. This provision is designed to ensure that the Tribunal's consideration is more than a mechanistic process and that it will consider both the qualitative and quantitive aspects of competition. Competition, after all, is a dynamic process, and merely adding up market share after the merger may, in some cases, tell little about the merger's impact on competition.

The new merger law will also provide, for the first time, for an exception in situations where the gains in efficiency that would result from the merger would more than offset the costs due to the lessening of competition. It is important for the performance of the economy that significant cost savings brought about by mergers, through scale or other economies, be considered.

I understand that a somewhat similar recognition of efficiencies is currently being taken by the U.S. Department

of Justice, and I'm told it is one of the more difficult tasks they have experienced in their merger analysis since sometimes competition-lessening "apples" have to be balanced against efficiency "oranges." Our initial experience over the last nine months reflects a similar challenge in undertaking this rather difficult balancing process, although we have not yet encountered a situation where efficiency gains have resulted in an "even weight" on the scales.

If the Tribunal finds that the merger lessens or is likely to lessen competition substantially, it has a wide range of orders to choose from. In the case of a completed merger, it can order dissolution of the merger or disposal of certain assets or shares by the parties to the merger or any other person. In the case of a proposed merger, the Tribunal may order the parties not to proceed with all or part of the merger, or may prohibit the doing of certain acts or things if all or part of the merger proceeds. In either a proposed or completed merger case, the Tribunal may also order the parties to take other action the Tribunal deems appropriate if the parties and the Director consent to the order.

A final aspect of merger law that I will touch on is that of prenotification. In most cases, the preferable time to challenge a potentially anticompetitive merger is before the proposal is completed. Once the parties have merged

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their assets and operations, it becomes more difficult to return the parties to their premerger position in the market. Without some form of prenotification, the Director's ability to make a preliminary assessment of the competitive impact of the merger, as well as his ability to take the necessary steps to stop an anticompetitive merger before it is consummated, would be seriously constrained. The present Act, therefore, has incorporated a prenotification requirement that will give the Director advance notice of the proposed merger while, at the same time, allowing parties to complete their deal with a minimum of delay and intervention. The prenotification requirement applies to large mergers where the combined sales or assets exceed $400 million and the value of the acquisition target itself exceeds $35 million in assets or sales, apart from amalgamations. The waiting periods under the provisions are also very short, ranging from 7 to 21 days. While many mergers will not fall within the prenotification provisions, it should be noted that the substantive merger law applies to all types of mergers, regardless of size. Although the prenotification provisions are not yet law, it is expected that they will come into force in June of this year. The supporting draft regulations were recently published in the Canada Gazette and we are waiting for comments from persons who may be interested in their proposed content.

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2. Specialization Agreements

As I mentioned at the outset of my remarks, one of the structural characteristics of many Canadian industries is that some plants are of suboptional size and have multiple product lines. When parties are considering merger candidates, they often look for partners that will provide opportunities to rationalize production to increase scale and other economies. This same objective, however, can be accomplished by internal specialization of product lines. The Act facilitates this alternative by allowing firms in certain circumstances to rationalize production by agreement with their competitors upon the approval of the Tribunal. Registration of such specialization agreements with the Tribunal provides an exemption to the conspiracy and exclusive dealing sections of the Act. Registration will be allowed when, like mergers, the efficiency gains are greater than, or offset, the effects of the lessening of competition, and where the efficiency gains could not be achieved in other ways.

3. Abuse of Dominant Position

Another significant change in the Competition Act is the replacement of the criminal offence of monopoly with a non-criminal abuse of dominance provision. The drafters of

this provision recognized that to remain competitive in the increasingly integrated world market, Canada must continue to develop world-class corporations. In some industries, this will involve firms becoming very large relative to the small domestic market. However, while large size may generate scale and other economies, it may also generate market power which could be used to lessen competition. When dominant firms use their market power to derail the competitive process, by impeding or preventing the entry of new or established rivals, the economy suffers and competition policy should intervene to correct the situation.

The old criminal monopoly provision proved to be a very ineffective instrument for addressing these concerns. First, the criminal nature of the provision made enforcement very difficult. Second, the test under the old law of public detriment proved to be an extremely vague standard which gave the courts little guidance as to what conduct Parliament intended to censure. It allowed arguments to be made which were unrelated to competition and abuse of market power. Third, the criminal law nature of the provision restricted the scope of appropriate remedies that could be employed to rectify specific abuses of market power.

These problems were addressed by two major changes. First, the law was moved into a non-criminal law setting, changing the standard of proof and allowing for a more

specialized arbiter which possessed greater latitude for remedial orders. Second, the substantive test was redrafted to focus attention squarely on the conduct to be censured: a dominant firm or firms engaging in a practice of anticompetitive acts that is having, or likely to have, the effect of preventing or lessening competition substantially in the relevant market. The provision makes it clear that size alone is not objectionable. It is the conduct of the dominant firm that becomes the subject of examination when the firm uses its market power to protect or extend its dominant position. If the Tribunal finds the necessary requirements of the section have been met, it may order the firm to stop the practice of anticompetitive acts, or may take other steps, such as divestiture, if necessary, to overcome the effects of the practice in the market.

<u>Compliance Initiatives</u>

Considerable work is being done within the Bureau of Competition Policy to ensure that the Act is effectively enforced. In my view, effective enforcement means not only the vigorous application of the Act, but also public awareness of the law and a flexible approach to resolving competition problems in an efficient and expeditious manner. To this end, the Bureau is now in the process of taking administrative action on three fronts. First, we are

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developing an enhanced communication program through the distribution of bulletins that will outline in some detail our view of the application and interpretation of the Act. Second, greater emphasis will be placed on the Bureau's longstanding program of providing advisory opinions. Under the Program of Compliance, the Director will indicate, based on the information before him, whether a particular fact situation would cause him to initiate an inquiry. I certainly encourage business people to take advantage of this service. Any specific information provided and opinions expressed will, of course, be kept in strictest confidence. It should also be noted that less formal opinions can be provided orally or on a "no-names" basis, although the completeness of the opinion will depend on the amount of information provided.

The third area of administrative action concerns increasing the use of information visits and negotiated settlements. In relatively minor matters at the complaint stage, an investigator may simply contact the company involved, explain the applicable law, and how it applies in the circumstances. The Bureau has successfully used this approach in the past in resolving some misleading advertising and deceptive marketing matters. It is also my intention to make greater use of negotiated settlements in appropriate cases, particularly in the context of the merger and other administrative law provisions. The Act facilitates this initiative by providing for a consent order

provision specifically applicable to non-criminal matters. Under section 77, the Tribunal may consider granting an order, whose terms have been agreed upon by the parties and the Director, without the necessity of going through a full, contested hearing. Such consent orders are likely to be used where it is necessary to ensure enforceability of the terms of the agreement over a comparatively long period of time or where variation of the terms may prove necessary. We are also examining ways to make greater use of consent prohibition orders in relation to the criminal provisions of the Act through increased use of section 30(2).

Our compliance initiatives and programs should be of particular interest to business people who are planning to grow through mergers or acquisitions. In my speeches over the past nine months, I've encouraged parties to come forward at an early stage with their proposals to see if they raise competition problems, and if so, to see if the proposals can be restructured to remove those concerns. The difficulty and expense of "unscrambling the eggs" once the deal is done means that it is in the best interest of the parties to come forward voluntarily before the transaction is completed. Business people may feel more comfortable in finding out the Director's position before making financial arrangements or publicly announcing their intentions.

In addition to consent orders, negotiated settlements, and program of compliance opinions, a compliance tool is

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available in the case of mergers. Section 74 of the Act provides that the Director may issue an advance ruling certificate when the proposal does not raise sufficient concerns for him to apply to the Tribunal. The effect of the certificate is that the Director cannot challenge the merger, provided the merger is substantially completed within one year after the certificate is issued, and there is no substantial change in the information upon which the certificate was based. An advance ruling certificate may be issued with or without certain terms or undertakings by the purchaser, depending on the circumstances of the case. In some cases, we will prefer to give a "no issue" compliance opinion rather than an advance ruling certificate. This will allow the Bureau to monitor a situation which raises no immediate concern but, due to the changing state of the market or other factors, might still raise an issue within the three-year period in which the Director could challenge the merger or a portion of it.

I would also like to mention that the Bureau is in the process of forming a merger branch to handle all merger and prenotification matters. The new Branch will have a staff of about 20 experienced officers, both economists and lawyers, as well as a number of support staff. The purpose of this organizational change is threefold. First, it will allow case officers to quickly develop expertise with all aspects of the merger provisions. Second, it will provide a

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focal point for consistent treatment of mergers. Third, it will enhance the Bureau's ability to deal with mergers in an effective and expeditious manner. Short turnaround time is, of course, of vital importance to the parties proposing the transaction. One of my objectives is to ensure that the Bureau's analysis and decision process fully recognizes that time is of the essence in these matters.

It should be noted that merger analysis is often not an easy task. In most cases we will have to try to predict the future effects of a transaction rather than gather evidence of facts that have already occurred. To assist us in arriving at the most informed decision possible within the limited time frame available, I intend to make greater use of legal, accounting, economic, and industry experts in order to supplement our own analysis of the transaction. Appropriate resources will be brought to bear on each and every case as necessary.

Recent Merger Experience

Before concluding my comments, I would like to point out that the initial experience we have with the new merger law, although brief, is encouraging. Since last June, the Bureau has examined in a significant fashion, or is in the process of examining, over 30 merger-related matters. Twenty-one matters have been resolved, six by a program of

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compliance opinion, two by issuing an advance ruling certificate, and 12 by closure because no significant competition concerns were ultimately raised. In one case, the parties abandoned the merger as a result of Bureau action. In most of the cases that gave rise to extensive examination, the parties have come forward voluntarily, sometimes well in advance of the public announcement of the transaction. As I indicated earlier, this is a practice I hope to foster and encourage. It should be noted that the Bureau, in addition to the 30-plus mergers mentioned, does a brief review of all mergers that come to its attention from the press, from Investment Canada, or otherwise, to determine whether any possible competition issues may arise, so that in fact the number of mergers considered by the Bureau is well in excess of 30.

Out of the cases and matters that have been reviewed in the past nine months, one case so far has been brought to the Competition Tribunal. On June 17, 1986, two days before the new Act was proclaimed, the four major Western dairy co-operatives agreed to jointly purchase their major competitor, Palm Dairies. This case raised a number of interesting and difficult issues, such as whether the new Act applied at all because the purchase and sale agreement was signed two days before the Act came into force while the closing date was scheduled after June 19th. My position from the outset was that the new Act applied because the

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acquisition was not substantially completed before June 19th. However, it was a novel legal issue and we recognized we were largely in uncharted waters. At the same time, control of Palm Dairies by the co-operatives was a result we were not prepared to accept. After extensive discussions, and in order to avoid taking an unnecessary risk on the unique jurisdictional issue, a negotiated settlement was worked out which, in my view, was sufficiently comprehensive to remove our major concerns about the merger.

The settlement was conditional on it being approved by the Tribunal. This was done for three reasons: to ensure enforceability of the detailed terms of the settlement; to maintain a capability to vary its terms either under section 78 or in accordance with the variation clauses of the draft order; and to ensure that the obligations under the order would not be subject to the limitation periods provided for in either section 75 or section 69 of the Act.

At its initial hearing, the Competition Tribunal delivered interim reasons wherein it asked for argument on the unique jurisdictional issue and on the terms of the proposed order. After appointing an amicus curiae, and hearing further argument, the Competition Tribunal delivered reasons wherein it expressed concern about the perpetual, mandatory nature of the arrangement, as well as the complexity, vagueness and effectiveness of some of the terms it contained. The Tribunal declined to grant the consent

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order. The jurisdictional issue, however, was not addressed in its decision. After initially appealing the decision, I decided it was preferable to leave the issues pertaining to the interpretation and application of the new consent order provisions to another day, if necessary. Therefore, as the conditional settlement was not approved, I returned to my original position that the proposed acquisition was not acceptable and the new Act applied. In the end, the parties decided to abandon the proposed acquisition, some seven months after they had originally signed the purchase and sale agreement.

Conclusion

The message I would like to leave you with is that the new Competition Act is a flexible piece of legislation designed to meet the requirements of the Canadian economy. Its provisions recognize the need for large, efficient Canadian producers who can compete in domestic and international markets. At the same time, the Act has been designed to effectively respond to concerns about the use and abuse of market power and substantial lessening of competition in specific markets.

In enforcing this new and quite complex piece of legislation, I intend to employ a flexible approach to resolving competition problems in a fair, effective and

expeditious manner where possible. I and members of my staff are available to discuss competition concerns with you at any time. I think you will find that we are approachable and I encourage you or your advisors to take advantage of the compliance programs offered by the Bureau of Competition Policy.

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Notes for an Address

on

Competition, Anti-dumping and the

Canada-U.S. Trade Negotiations

to the

Canada/United States Law Institute of Case

Western Reserve University School of Law

by

Calvin S. Goldman

Director of Investigation and Research

Competition Act

and

Assistant Deputy Minister

Bureau of Competition Policy

Consumer and Corporate Affairs Canada

Cleveland, Ohio

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Introduction

I am pleased to have the opportunity to address such a distinguished audience. The issues which are being discussed at this conference are of great importance in the context of the current bilateral trade negotiations and I would therefore like to congratulate the organizers of this conference for an excellent and timely choice of topics.

Trade has always played an important role in the long and fruitful relationship which has developed over the years between our two nations. Today this trading relationship is more important than ever. Approximately 25 percent of Canada's GNP is accounted for by exports to the United States, while Canada remains the United States' largest trading partner. One can expect that the successful completion of the ambitious and historic trade negotiations currently underway will foster further trade between our two nations and contribute to increased economic growth.

Trade liberalization can be expected to have important implications for the laws and policies for the two countries. The increasingly important relationship between domestic markets and international trade will create pressures for greater compatibility between international trade policies and domestic economic policies. Moreover, if there is gradual elimination of barriers at the border under

a bilateral agreement, then it will shift the focus of attention to differences in domestic laws and policies which are not traditionally associated with trade, and to the need to bridge existing differences between them.

This effect of multilateral trade liberalization has already been felt as indicated by important legislation adopted or discussed in our two countries in recent years. For example, the new Competition Act which came into force in Canada in June 1986 recognizes the role of international trade in a number of fundamental respects. For instance, the new purpose clause makes reference to the importance of creating opportunities for Canadian participation in world markets, and recognizes the role of foreign competition in Canada. As well, the new merger law, the specialization agreement provision, and the export exemption are other examples of the consideration of international factors in the new competition legislation. Similarly, foreign competition has been given more prominence in the application of some U.S. antitrust laws, as for instance in the 1984 merger guidelines, the recent Supreme Court decision in the Zenith case, as well as the Reagan Administration's 1986 legislative proposals in the bill to establish the Foreign Trade Antitrust Improvements Act.

Competition policy is probably one of the areas of public policy most influenced by changes in the trading environment. When trade policy fosters trade liberalization

it tends to strengthen the competitive process at the domestic level and it complements the enforcement of domestic competition law. On the other hand, trade measures which deny or impair market access to foreign competitors inhibit competition and work at cross-purposes with domestic competition policies.

From this perspective, the growing conflict between competition law, on the one hand, and the contingency protection laws on the other, notably antidumping, is particularly troublesome and raises at least three important issues in the trade negotiations:

(1) Is the maintenance of the existing antidumping regime compatible with trade liberalization under a bilateral agreement?

(2) Does competition law provide a more suitable alternative?

(3) Assuming that it does, what particular competition regime should be put in place to govern pricing practices between our two countries?

In what follows I shall explore these issues and attempt to identify some of the considerations which, in my view, are important from a competition policy perspective in relation to transborder pricing practices in the context of a free trade agreement.

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Historical Perspective on Dumping, Price Discrimination and Predatory Pricing

Historically, concerns over the possibility of using price differentials in the exercise of market power were first expressed in the international trade context. So far as I am aware, Canada in 1904 was the first country to introduce a statute aimed at dumping. (The United States did so in 1916.) The Canadian legislation was implicitly governed by a motive to prohibit predatory dumping i.e. dumping designed, in the words of the then Minister of Finance, "to crush out the native Canadian industry." However, the legislation did not contain at that time, nor in any subsequent form, a requirement that there be evidence of predation or intent to destroy a domestic industry. It became quickly recognized that showing predatory intent in international trade would raise serious evidentiary problems, mainly because of the extraterritorial dimension implicit in the investigatory process. As a result, the predatory element was quickly forgotten and antidumping law increasingly focussed on the protection of domestic producers from particular "unfair" and "injurious" imports.

By way of comparison, price discrimination and predatory pricing laws were enacted in Canada in 1935 following the conclusions of the report of the Royal Commission on Price Spreads that the pricing practices of

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certain firms tended to foster "the survival of the powerful rather than the efficient." The Commission was of the view that certain practices were so definitely unfair that they warranted complete prohibition. The new law included provisions regarding discriminatory discounts [which is now section 34(1)(a)], geographic price discrimination [now section 34(1)(b)], and predatory pricing [now section 34(1)(c)]. However, compared to other provisions of the statute, these provisions have not been as actively enforced until recent years. One of the main reasons has been their criminal nature. By requiring proof beyond a reasonable doubt, the law has imposed a difficult legal test to deal with alleged unfair pricing practices. This was done in Canada because of earlier decisions which limited the constitutional jurisdiction for combines law to the federal criminal law power. Recent court decisions, however, have opened the door to the federal trade and commerce power. I'm hopeful the Supreme Court of Canada will soon keep it permanently open in a case now before it on the constitutionality of the civil damages remedy in the Competition Act.

The geographical price discrimination provision of the Competition Act (34(1)(b)) has the greatest overlap with antidumping laws, since both are aimed at pricing practices which occur over separate geographical markets. The main difference is that in the former the markets are delineated

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internationally. However, despite these similarities, these two laws are widely divergent in application.

The Compatibility of Antidumping with Freer Trade

One of the primary goals of free trade is to remove barriers to trade that shelter domestic industries from international competition. By providing freer access to markets, a free trade area would enhance the free play of market forces and thereby promote economic growth and prosperity. Antidumping is fundamentally incompatible with this objective of free trade to the extent that it results in a differentiated treatment between domestic and foreign firms, while a major condition for effective competition in a free trade area is the establishment of a level playing field. Furthermore, the empirical evidence on the application of antidumping laws strongly suggests that they have often been used to protect domestic producers from foreign competitive pressures. By retarding the adjustment process, it is well recognized that antidumping laws prevent the economy from enjoying the full benefit of trade.

It is worth pointing out also that the EEC has recognized this incompatibility of antidumping in its economic arrangement, and member states do not maintain independent national antidumping laws against other member states.

Antidumping is not only incompatible with freer trade, but becomes largely unnecessary in a free trade environment, even in terms of its narrow objective of protecting domestic competitors. This is because the scope for market segmentation between the home and export markets, a necessary condition for dumping, is significantly reduced by the removal of trade barriers. Any price differential which may arise between two open economies will be rapidly arbitraged away, assuming the competitive process is allowed to work. While some firms may find other ways to segment markets at the border, their pricing practices are likely to resemble those experienced at the purely domestic level.

Competition Law as an Alternative to Anti-Dumping

If antidumping law appears to be inappropriate to deal with pricing practices in a free trade area, can competition law provide a better alternative? I believe it can and I intend to show you why by comparing the two laws in terms of (a) the nature of the offence and the way it is determined; (b) the injury test; and (c) the remedies that are applied.

Under the Canadian antidumping law, the determination that dumping is taking place requires showing: first, that the goods are being imported into Canada at prices lower than the normal value in the exporter's home market, the so-called margin of dumping; and second, that the goods

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being dumped are or are likely to cause material injury to, or retard, the production in Canada of like goods.

Measuring the margin of dumping falls short of what is usually required under competition law to establish geographic predation. Evidence of dumping is established by comparing two sets of prices: the export price and the "normal" domestic price. The element of cost, the length of the period for which a price differential has been reported, and more fundamentally the state of competition in the domestic and export markets are not an explicit part of the analysis. In addition, antidumping laws act as an incentive for foreign exporters to charge export prices which are usually higher than their total cost of production, as otherwise antidumping duties may follow since normal value is generally at or above the cost of production.

In contrast, the establishment of predatory pricing under competition law requires evidence of sales at prices unreasonably low. Although no conclusive definition of "unreasonably low" has been established in Canada, it is generally accepted today that a price above average variable cost would not be considered as unreasonably low or predatory in a case where there is overcapacity and the firm is loss minimizing by setting a price that still makes a contribution to its fixed overhead. Hence, the predatory law standard imposes a much higher burden of proof than the standard of normal value price adopted in antidumping laws.

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Moreover, in competition law, the low pricing must be part of a "policy," and this avoids interfering with isolated or sporadic acts undertaken for legitimate business reasons such as meeting aggressive spot competition. General economic conditions of the industry such as declining demand, and large excess capacity may also be taken into consideration in the determination of whether prices are set with a predatory intent.

The material injury test in antidumping law usually involves the production of evidence showing loss of sales, decline in profits, decrease in capacity utilization, lowering of return on investment and the loss of employment in domestic industries. All these factors have one common element: they focus on injury to domestic competitors and <u>not</u> injury to the process of competition. In competition law, unreasonably low pricing policies directed against competitors are prohibited when they are designed to, or have, the effect of substantially lessening competition or eliminating a competitor. Relevant evidence will focus on various elements of market structure, conduct and performance. While antidumping law has the effect of protecting domestic competitors, whether they are efficient or not, competition law is aimed at the protection of the competitive process. As such, it does not protect competitors against lower prices that are achieved through enhanced economic efficiency via economies of scale, lower labour

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costs or superior technological expertise. Rather, a major benefit of competition law is the enabling of the market-place to operate in as efficient a manner as possible. This overall objective has now been incorporated by Canada's Parliament in its statement of the purpose of the new Competition Act in section 1.1 of that Act.

A further distinction between antidumping and competition law relates to the remedies available under each regime. Antidumping law is designed to provide summary relief for domestic industries threatened by imports. The remedy applied, in the normal case, is a special duty which offsets the effect of the price differential. In some instances, however, an antidumping investigation may be suspended at an early stage if foreign suppliers agree to give an undertaking to cease dumping or otherwise eliminate the injurious effects of dumping. In all such instances, such undertakings amount to the elimination of competition and may even encourage collusion in the relevant industry. By contrast, remedial orders and undertakings in competition matters are premised on preserving or enhancing the competitive process. In the case of a criminal matter, punitive sanctions can be imposed to further deter harmful conduct.

This brief sketch of the major differences between the approaches of trade and antitrust laws to price discrimination suggests that competition laws provide a more rational

standard than antidumping laws for dealing with the injury which may be caused by price differentials. Moreover, focussing upon the effects of the practice on competition, the stricter requirements for the application of the competition law provisions make it more unlikely that they can be abused by complainants seeking relief from legitimate competition. Overall, the competition law standards foster the broader objectives of economic welfare and growth which, of course, are the underlying rationales for the current bilateral trade negotiation exercise.

The Competition Regime Under Freer Trade

The third question I posed earlier therefore arises, namely, what particular competition regime should be instituted in relation to pricing practices in a freer trade arena. From my earlier comments it would appear that the preferable way to deal with abusive pricing practices in a free trade arena would be to apply existing domestic competition law to such practices. While this solution may appear attractive at first blush, it has to take into account the major differences which exist between Canada and U.S. law in regard to the substantive provisions, notably price discrimination, as well as in regard to enforcement procedure, notably the scope for private action and the recovery of damages. These differences are significant

enough in my opinion to raise questions about the viability of this option. It could result, for instance, in the creation of an unbalanced regime in which firms in one jurisdiction may be given an advantage over firms in the other. This might not only result in inefficiencies but also in growing pressure for the re-imposition of special measures of protection.

In view of these differences in our respective competition laws, a greater degree of compatibility between Canadian and U.S. law would be warranted. This would not be an easy task. Indeed, it will require a significant amount of goodwill on both sides, since many of the issues which arise may be politically sensitive and could have profound implications for the legal systems which currently prevail in the two countries.

Nonetheless, the suggestion of compatible standards has some merit, particularly where such standards introduce improvements in existing antitrust provisions so as to foster the objective of the free trade area. To this end, it would be important for the new regime to reflect the current "state of the art" in antitrust thinking about price discrimination and predatory pricing, so as to ensure that only truly anticompetitive pricing practices are deterred.

The new regime could also provide for a reasonable degree of predictability so as to develop a hospitable business environment. If economic efficiency and growth is

going to be fostered, it is important that business can make decisions on the basis of an accurate understanding of the institutional environment in which it operates. This would imply the need for establishment of clear rules to ensure a consistent interpretation of the relevant law in both jurisdictions.

Furthermore, the new regime should carefully define the appropriate rules governing jurisdictional issues, enforcement activities and the application of remedies. Particularly relevant in this regard would be rules pertaining to enforcement and co-operation between antitrust agencies, and the enforcement of judgments and directives made in the other jurisdiction. This would provide a better method of dealing with conflicts of law or jurisdiction than the current, largely ad hoc, approach to solving extraterritoriality principles that apply to matters arising between the U.S. and Canada.

While all these considerations deserve careful attention, I will now focus my remarks on what might be desirable competition objectives in a new price discrimination regime and examine how competition considerations can impact on the selection of an appropriate system to govern transborder price discrimination and predatory pricing practices.

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(a) Substantive Provisions

With regard to the substantive provisions, the exercise could begin by abstracting for a moment from the existing national law provisions and asking how price discrimination and predatory pricing could best be treated in light of current antitrust thinking on the question.

Price discrimination is defined as a situation where a particular supplier sells the same commodity or service at more than one price. More generally, price discrimination arises whenever like products are sold at different price/ cost ratios. Three necessary conditions must hold for price discrimination to be a rational pricing strategy for the firm: (1) the seller must have market power, (2) the buyers must have different elasticities of demand for the product, and (3) various buyer elements must be capable of being kept separate.

The question of how competition law should deal with price discrimination has been the subject of considerable debate in the literature over the years. While a populist, relatively hostile, view prevailed in earlier years, a much more permissive "Darwinian" attitude has now become the vogue. This is reflected in the very limited public enforcement of price discrimination provisions in our two jurisdictions in recent years. Several reasons underlie this more liberal approach. First of all, it is recognized that,

although price discrimination generally redistributes income from high-price consumers to low-price consumers and producers, it may allow the production of goods or products which are socially beneficial but would not exist otherwise. Moreover, price discrimination typically enhances allocative efficiency by allowing firms to produce a level of output which is closer to the competitive level than under simple monopoly pricing. Finally, price discrimination may also foster competition, for instance by undermining oligopolistic cartels.

On the other hand, there are situations where price discrimination may in fact be anticompetitive. This is the case, for instance, when such pricing practices reflect price fixing agreements or are used in a predatory manner to drive a competitor out of the market or prevent the competitor's entry, or if they result from and contribute to a firm's anticompetitive exercise of its market power.

Predatory pricing can be considered as a special form of price discrimination which involves a temporary price cut with the intent of eventually restricting supply. Rational predation typically requires that reasonable prospects exist for the predator to recoup its losses after the predatory campaign. In other words, the market must be relatively protected from entry so that it is not readily contestable. Predators must also have a "deep pocket," or at least a deeper pocket than the rivals they wish to eliminate.

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I might just add that one potential benefit of a freer trade arena is to reduce barriers to entry, making markets more contestable and therefore reducing the ability of a firm to engage in predatory conduct.

There are typically three main reasons for predation: (1) driving a competitor out, (2) disciplining an unco-operative competitor, and (3) deterring entry of a would-be competitor. Although examples of these three forms of predation can be found in the literature, true predation is believed to be a rather rare phenomenon since in many cases, the firm cannot really expect to recoup its losses after predation because either the barriers to entry are relatively low, or because there are less costly ways for the firm to achieve or preserve a position of dominance in the market.

True predatory pricing is clearly harmful to competition and can, therefore, be justifiably prohibited. In Canada, predation is dealt with as a criminal matter in two sections of the Competition Act. In practice, it is often very difficult to distinguish predation from vigorous competition. Too stringent an approach to predatory pricing may stifle rather than enhance competition. An examination of the intent of the firm which engages in the pricing practice could possibly provide a way to distinguish between the two situations. This is difficult in practice, but the courts have inferred intent by the application of cost rules

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which attempt to relate the alleged predatory price to various measures of cost (e.g. the well-known Areeda-Turner test) as well as to relevant structural factors, notably whether the firm is indeed in a dominant position and whether it might reasonably be expected to be able to recoup its losses after the predatory campaign. On the basis of these tests, relatively few cases of predation have resulted in conviction.

In contrast to this approach, predation can also be dealt with as a non-criminal matter, as it is in the U.S. and as in the new civil provision on abuse of dominant position in the Competition Act. In adding these abuse provisions to the legislation, Parliament has required that there be shown to be a practice of anticompetitive acts. Evidence of an anticompetitive purpose is required in each of the listed examples of anticompetitive acts contained in section 50. Price discrimination and true predatory pricing are not part of the non-exhaustive list of anticompetitive acts set out in the abuse of dominance provisions, although one listed act is very close to predation. It is arguable, however, that any abusive pricing conduct, engaged in for the purpose of preventing entry or disciplining or eliminating a competitor, falls within the other kinds of anticompetitive acts covered in the abuse provision.

It should be noted, however, that in addition to the finding of an anticompetitive act, there are a number of

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other requirements in the section that must be shown before the Tribunal could make an order prohibiting the conduct. First, the abuse provision applies only to a practice of anticompetitive acts and not to a temporary aggressive strategy aimed at legitimate marketing objectives. Second, evidence of dominance among a class or species of business must be shown. Finally, the end result of the practice must be an actual or likely substantial lessening of competition in the relevant market. These elements are certainly consistent with current views that any abusive anticompetitive practices can only harm competition if they are engaged in by a dominant firm in a market. It is worth noting that the Treaty of Rome, which established the European Economic Community, contains a provision dealing with abuse of dominant position which provides for uniform antitrust treatment of pricing practices between member states.

In the context of today's discussion, I don't have time to elaborate on each of the differences between Canadian and U.S. price discrimination and predatory pricing provisions, as a great deal of study would have to be done in that regard. I do, however, suggest the new abuse of dominance provision may provide a good starting point for that study.

(b) Procedures

Another fruitful area for study is that of procedural differences between the two countries. It is in terms of

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procedures that the Canadian and U.S. price discrimination laws display the strongest divergence. Despite similarities in the frequency of public enforcement actions, a large number of price discrimination cases in the United States come from private parties who, presumably, are motivated by the possibility of recovering treble damages. In Canada, the scope for private enforcement and the recovery of damages is limited. Under section 31.1 of the Competition Act private parties can seek to recover damages and the cost of proceedings incurred in an action alleging conduct contrary to the criminal provisions of the Competition Act or for a failure to comply with an order of a court or the Competition Tribunal in a civil proceeding. In such actions, it is not necessary that there be prior convictions before proceedings can be instituted. This means that private enforcement is possible as long as the plaintiff is prepared to meet the burden of proof that he or she has been a victim of price discrimination and has consequently suffered damages. The use of this provision is still limited as its constitutionality remains subject to challenge pending the decision of the Supreme Court in two cases, one of which, <u>City National Leasing v. General Motors of Canada</u>, involves an alleged violation of the price discrimination provision of the Competition Act. It is important to note further that the recovery of damages is limited in Canada to actual or single damages. Moreover, there is no direct right of

private action for the recovery of damages based on conduct which may be contrary to the abuse of dominance provisions of the new legislation. It should be noted, however, that any breach of an order made by the Tribunal, as for example in an abuse of dominance case, would carry a right of civil action.

Support for private actions has been expressed on both sides of the border. Such actions have been viewed in the U.S. as a valuable complement to public enforcement in achieving compliance with the antitrust laws. The U.S. Supreme Court has characterized the private suit as a "bulwark of antitrust enforcement" which "furthers the overriding public policy in favor of competition." In addition to their perceived compensatory and deterrent benefits, private civil actions are also considered to offer potential safeguards in cases where government officials do not proceed vigorously with the detection and prosecution of suspected violations. Support for private actions has also been expressed in Canada. In their important 1976 report, Dynamic Changes and Accountability in a Canadian Market Economy, Skeoch and McDonald noted that private actions are an integral part of the total law enforcement apparatus. They provide compensation for injured persons and prevent the unjust enrichment of those who breach the law, thereby inducing compliance with the law by strengthening the deterrence element.

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In addition to differences concerning the right of private action, a further major procedural difference is the availability of treble damages in the United States. Some observers believe that such trebling may in fact be a vehicle by which antitrust laws can be used to subvert competition. For instance, Scherer (1980) points out that the proliferation of treble damage suits in connection with alleged violations of some U.S. antitrust laws, particularly in price discrimination and monopolization cases, may have encouraged more conservative, less aggressive business behaviour. Scherer also notes the strong temptation for nuisance suits to be filed in the expectation that the target companies will offer an out-of-court settlement, including an appreciable fee for the plaintiff attorneys who often act as entrepreneurs in initiating the case, rather than bear the costs and risks of litigation. Similar concerns have been expressed by Baumol and Ordover (1984) who equate the protectionist use of antitrust to a form of rent-seeking behaviour. This behaviour imposes substantial costs on the economy, not only because of the valuable resources which are dissipated in the proceedings (e.g., the time of judges, court officials, lawyers and expert witnesses) but also because it contributes to resource misallocations and creates disincentives for internal operating efficiency.

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Hence, it would appear that some degree of consensus may be emerging among many antitrust practitioners that private actions are a useful and important element of the enforcement mechanism, but that the use of treble damages may be more questionable, at least in some circumstances.

This emerging consensus among experts may be reflected more clearly in the future in our respective laws and could be a useful starting point in an attempt to build a new regime. For instance, I have noted with interest the amendment to the U.S. law proposed by the Reagan Administration which is designed to reduce the use of treble damage remedies in certain circumstances. In Canada, the upcoming decision of the Supreme Court on the constitutionality of section 31.1 in the Rocois Construction and City National Leasing cases will have a decisive effect on the use of private actions in Canada. The decision could move Canadian practice closer to the U.S. model.

Conclusion

In conclusion, I would like to come back to the three main questions which I raised in the beginning of my presentation.

The first question was whether antidumping was compatible with a freer trade environment. My answer here is clear: I suggest it is not. Antidumping laws tend to

protect competitors rather than the competitive process and thus represent a serious impediment to the play of market forces in a free trade area. In addition, removal of trade barriers reduces the possibility that antidumping price differentials would persist.

The second question was whether competition law provides a more suitable alternative. My answer here is yes. Reliance on the price discrimination and predatory pricing laws is preferable, I suggest, for two main reasons. First, it is consistent with the intent of a freer trade agreement to eliminate barriers at the border and ensure predictable and secure market access. Second, it enhances competitiveness and the efficiency of the market place. It precludes actions against pricing practices which have little or no effect on the competitive process.

The third question is what particular competition regime should be put in place in a freer trade environment. This is a much more difficult question for which I certainly do not have the answers. There are significant differences in both the substantive and procedural provisions of the competition laws of our two countries. Nevertheless, in relation to the substantive laws, it is my view that the abuse of dominance provision recently adopted in the new Canadian Competition Act provides a useful building block. Moreover, there appears to be some movements in procedures toward greater compatibility between the two legal systems.

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Procedural differences, however, still remain as the greatest challenge in trying to use competition laws to discipline transborder pricing practices.

Therefore, if a freer trade environment does arise, a great deal of study is going to have to be devoted to this complex set of issues pertaining to what kind of antitrust regime should be put in place. In addition, I am fully aware that there are numerous other issues that require careful attention, particularly the conflict resolution mechanism, and the perennial issue of extraterritoriality. However, I am confident that these questions will not remain unanswered since we have in the audience several distinguished experts who, I am sure, have devoted a lot of thought to these issues.

I want to make one further point, and that is that there also has to be a good deal of study done in any transitional period on the issue of whether the replacement of antidumping laws between our two countries by antitrust laws would leave any significant gaps that warrant specific attention. Thus, those who are experts in both fields are going to have a good deal of work ahead of them if the trade discussions are to be successful.

Thank you.

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ERRATUM

The speech entitled: "The impact of the Competition Act on Corporate Concentration" delivered by Calvin S. Goldman, Director of Investigation and Research and Assistant Deputy Minister, Bureau of Competition Policy, Consumer and Corporate Affairs Canada, on August 25, 1987, at the Canadian Bar Association's annual meeting contained an error which occurred in the printing process of the English version of the text. The phrase **(includes Palm Dairies case)** appearing in the statistical table on the bottom of page 17, next to the phrase "Proceeded under Advance Ruling Certificate" should in fact have appeared at the top of page 18 next to the phrase "Parties abandoned merger as a result of Director's position".

We have enclosed a corrected version of the English text for your easy reference and apologize for any invonvenience this inadvertence may have caused.

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Speech

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

S-87-23

THE IMPACT OF THE COMPETITION ACT ON CORPORATE CONCENTRATION

Notes for an address

to the

Corporate Counsel Section of the Canadian Bar Association

by

Calvin S. Goldman

Director of Investigation and Research

and

Assistant Deputy Minister

Bureau of Competition Policy

Consumer and Corporate Affairs Canada

Ottawa, August 25, 1987

Canada

Check against delivery

1. Introduction

The Competition Act is a general law of general application which sets out a framework within which Canadian business firms are to conduct themselves in the marketplace. The Competition Act was enacted 14 months ago and contains both criminal and administrative law provisions which directly or indirectly bear upon the subject of today's panel discussion, namely, corporate concentration.

The term corporate concentration incorporates three distinct but inter-related concepts: aggregate concentration, industry or market concentration and ownership concentration. I will discuss each of these concepts in greater detail. However, I would like to initially point out that since the Competition Act is primarily concerned with competition in relation to markets, the particular type of corporate concentration of concern to the Bureau is market concentration.

With respect to the various broader issues of corporate concentration, I would like to mention that a few months ago the Minister of Consumer and Corporate Affairs, the Honourable Harvie Andre, delivered an important address on this subject. In his speech in Toronto on March 31, 1987, the Minister identified and discussed the principal questions which policy makers and others must grapple with in relation to corporate concentration in all of its current

dimensions. In that regard he indicated that more deliberate and disciplined thought was required -- public, corporate and governmental -- if we are to have a better understanding of the issues corporate concentration raises.

In my remarks today, I wish first to describe the basic objectives of Canadian competition law. I would like then to discuss briefly the different dimensions and issues raised by the phenomenon of corporate concentration. Following this discussion, I will sketch out the main provisions of the Act which primarily address concerns regarding market concentration, but which also affect other dimensions of corporate concentration. Finally, I wish to share our experience to date with the application of the new Act.

In this regard, it is my view that the new Act is already having its intended effect on the structure and conduct of firms in the marketplace, and that it is contributing significantly towards alleviating many of the concerns raised by the phenomenon of corporate concentration, particularly in relation to specific markets in Canada.

2. Objectives of the Competition Act

There are a number of underlying themes which thread together the various provisions of the Competition Act. These flow from the purpose clause (section 1.1) and can be enumerated as follows:

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First and foremost, the Act is a general law of general application which seeks to maintain and strengthen the role of market forces, thereby encouraging maximum efficiency in the use of economic resources. Competition is not regarded as an end in itself but as a vehicle in the achievement of economic efficiency.

Second, the law recognizes the importance of international trade in exerting competitive pressures in the domestic economy and in providing export opportunities for Canadian firms.

Third, the need to have large firm size for achieving economic efficiencies is explicitly recognized and is not necessarily viewed as being adverse to competition. The size of a firm per se is not the primary concern under the Act, but rather the use and abuse by a firm of its market power.

Fourth, where through the process of a merger or a specialization agreement large firm size is necessary, the efficiency gains are to be counter-balanced with the impact on competition. The efficiency gains have to offset and be greater than the adverse effects the new larger firm may have on competition.

Fifth, the Act seeks to establish a clear, equitable and consistent set of standards aimed at preventing abuses of market power, and ensuring firms compete effectively and

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fairly in providing customers with product and quality choices at the lowest possible prices.

These themes -- efficiency, adaptability and international competitiveness -- have been designed to meet the unique needs and characteristics of the Canadian economy. Canada's small and geographically segmented markets often lead to high levels of market concentration. Despite their large size relative to the domestic market many Canadian companies, however, are still too small to achieve efficient scale of production and therefore may find it difficult to compete with foreign firms at home and abroad. Industries and firms may need to rationalize production facilities in order to be competitive. In this regard international competition can also play an important role in some markets which would otherwise be dominated by one or few domestic firms.

To put it as succinctly as possible, the Competition Act is designed not to inhibit firms from growth and restructuring in order to attain economic efficiency, but to strengthen and maintain the important role played by market forces in this process of achieving efficiency.

3. <u>The Dimensions of Corporate Concentration</u>

Corporate concentration is multi-dimensional and encompasses three distinct concepts.

The first concept is aggregate or overall concentration, which measures the relative position of large firms in the economy as a whole or in broad sectors of the economy such as the manufacturing or financial services sector. This measure may include, although not necessarily, conglomerate firms which span two or more sectors.

The second concept is industry or market concentration which measures the relative position of large firms in specific markets such as meat packing or motor vehicles. This measure may be further refined to measure detailed product level concentration such as four-door passenger automobiles.

The third concept, ownership concentration, relates to the extent to which shares of a firm are widely held and traded or closely held by a few wealthy families or corporate entities.

These concepts are, in some respects, inter-related. High levels of aggregate or overall concentration in the Canadian economy may be the result of the presence of large firms in given markets and/or the conglomeration and common ownership control of different firms in different markets. A firm may be large not only in terms of absolute size in relation to the economy as a whole, but it may also account for a significant share of activity in specific markets.

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Thus, market concentration may underlie prevailing levels of aggregate concentration.

While much more empirical research needs to be conducted on the phenomenon of corporate concentration, my understanding is that aggregate concentration levels in Canada tend to be somewhat higher than those prevailing in some western industrialized countries. And those levels have been increasing over the past decade or so. Industry or market concentration in Canada also tends to be high, but the trend in recent years has remained comparatively more stable. With both aggregate and market concentration, large firm size is a result of internal growth and corporate takeover activity. But the pace of takeover activity has increased in recent years and has contributed to the increasing trend in aggregate concentration. Ownership concentration in Canada also tends to be high relative to the United States. While the majority of major U.S. corporations listed on the New York Stock Exchange tend to be widely held, the same is not true of the Toronto Stock Exchange.

Various types of concerns have been raised in connection with different aspects of corporate concentration. The first relates to whether or not high levels of aggregate concentration represent undue accumulation of economic, social and political power which can result in corporate

influence on government decision making. Assessing the validity of these concerns falls outside the mandate of the Competition Act.

The second set of concerns relates to the extent to which aggregate concentration results in concentration and dominance in individual markets giving rise to anti-competitive practices and adverse economic effects. Here the issues are twofold: (i) those that arise from high levels of market concentration increasing the potential for use and abuse of market power such as predatory pricing and, (ii) those that arise from conglomeration and may facilitate practices such as tied selling. These types of concerns fall within the mandate of the Bureau of Competition Policy and are addressed by specific provisions of the Competition Act which I will be discussing in the next section.

The last set of concerns relates to ownership concentration. The issues that are generally discussed in this area relate to corporate governance, information disclosure and minority shareholder rights. Although these issues may conceivably raise some broad competition policy questions, they generally fall within the mandate of other statutes such as the Canada Business Corporations Act and various provincial securities legislation.

4. Major Provisions of the Competition Act Impacting on Corporate Concentration

I have on a number of occasions during the past year discussed in detail the various provisions of the Competition Act. My remarks today will therefore be relatively brief. The provisions most relevant to the issue of corporate concentration are the Abuse of Dominant Position (s. 50-51), Mergers (s. 63-65 and 68 in particular), Specialization Agreements (ss. 57-62) and Tied Selling, Exclusive Dealing and Market Restriction (s. 49).

Abuse of Dominant Position

A significant change in the Act is the replacement of the criminal offence of monopoly with a non-criminal abuse of dominance provision. This provision recognizes that to remain competitive in the increasingly integrated world market, Canada must continue to develop world-class corporations. In some industries this will involve firms becoming very large relative to the small domestic market. However, while large size may generate scale and other economies, it may also generate market power which could be used to lessen competition. When dominant firms use their market power to derail the competitive process by impeding or preventing the entry of new or established rivals, the economy suffers and competition policy should intervene to correct the situation.

The old criminal monopoly provision proved ineffective in addressing these concerns. First, the criminal nature of the provision made enforcement very difficult. Second, the test under the old law was that of public detriment, which proved to be an extremely vague standard. Moreover, the courts had little guidance as to what conduct Parliament specifically intended to censure. Third, the criminal law nature of the provision restricted the scope of appropriate remedies that could be employed to rectify specific abuses of market power.

These problems have been addressed by two major changes. First, the law has been moved to a non-criminal area, changing the standard of proof and allowing for a more specialized arbiter which possesses greater latitude for remedial orders. Second, the substantive test has been redrafted to focus attention squarely on the conduct to be censured: a dominant firm or firms engaging in the practice of anti-competitive acts that is having or is likely to have the effect of preventing or lessening competition substantially in the relevant market. The provision makes it clear that size alone is not objectionable. It is the conduct of the dominant firm that becomes the subject of examination when the firm uses its market power anti-competitively to protect or extend its dominant position. If the newly established Competition Tribunal, which adjudicates such

matters, finds the necessary requirements of the section have been met, it may order the firm to stop the practice of anti-competitive acts, or to take other steps such as divestiture, if necessary, to overcome the effects of the practice in the market.

Mergers

The most significant change brought about in the new law is in the area of mergers. The criminal merger law under the Combines Investigation Act proved to be totally ineffective with the result that over a 75-year period, the Crown was never able to obtain a conviction in a contested merger prosecution. A major reason for this lack of success was that the merger law was placed in the criminal law environment which included the criminal burden of proof -- the familiar "beyond a reasonable doubt." The law also incorporated the test of proving the merger to be detrimental to the public, a rather troublesome measure, to say the least.

To correct these and other difficulties, the new merger law has been decriminalized and is now part of the administrative law process. The new merger law adopts a test of substantial lessening of competition which takes into account a broad range of factors, such as foreign competition, barriers to entry, availability of substitutes, extent of change and innovation, and the effective

competition remaining after the merger. In determining whether the merger substantially lessens competition, the Tribunal is directed by the Act to consider these and other factors. It should be noted that the Tribunal is not permitted to find that a merger substantially lessens competition solely on the basis of evidence of market share or concentration. This provision is designed to ensure that the assessment of the merger under the law is more than a mechanistic process and involves consideration of both the qualitative and quantitative aspects of competition. Competition, after all, is a dynamic process, and merely adding up market share after the merger may in some cases tell you little about the merger's impact on competition.

The new merger law also provides an exception in situations where the gains in efficiency resulting from the merger would more than offset the anti-competitive effects arising therefrom and such gains would not be realized if an order were made by the Tribunal. It is important for the performance of the economy that significant cost savings brought about by mergers, for example, through scale or other economies, be considered.

A number of approaches can be used under the new law to resolve merger-related matters. If on application by the Director the Tribunal finds that the merger lessens or is likely to lessen competition substantially, it has a wide

range of orders to choose from. In the case of a completed merger, it can order dissolution of the merger or disposal of certain assets or shares by the parties to the merger or any other person. In the case of a proposed merger, the Tribunal may order the parties not to proceed with all or part of the merger, or may prohibit the doing of certain acts or things if all or part of the merger proceeds. In the case of either a proposed or completed merger, the Tribunal may also order the parties to take other action the Tribunal deems appropriate if the parties and the Director consent to the order. The inclusion of new specific consent order provisions in the Act marks a significant change and points toward resolution, where appropriate, on a more expeditious basis than fully contested proceedings.

In addition to these formal procedures, firms can also approach the Director to discuss their proposals before they are implemented. The Director encourages this consultative process wherever possible. If the proposed merger does not raise any competition concerns, provisions now exist for the Director to issue an Advance Ruling Certificate so that the transaction can proceed with greater certainty. The Director has also entertained proposals for voluntary divestiture or other undertakings upon or prior to successful completion of a merger. Such undertakings may enable the parties to proceed on the understanding that if the under-

takings are not fulfilled, the matter will proceed before the Competition Tribunal for an order in that regard. In other merger cases, the transaction may be permitted to proceed under the umbrella of a letter given by the Director under the Program of Compliance, which will usually raise the issues the Director will be monitoring in the three-year limitation period provided by the Act.

The new merger law also contains provisions which require pre-notification of large transactions. The pre-notification provisions were proclaimed in force on July 15, 1987, and apply to large mergers where the combined revenues or assets of the parties exceed $400 million and the value of the acquisition target itself exceeds $35 million in assets or revenues, apart from amalgamations. Waiting periods ranging from 7 to 21 days are allowed for under the provisions before the merger can be consummated. While many mergers will not fall within the pre-notification provisions, it should be noted that the substantive merger law applies to all types of mergers, regardless of size and type, whether they be horizontal, vertical or conglomerate mergers. At the same time all large mergers that meet the pre-notification thresholds are now subject to the pre-notification provisions under the Act, whether or not the parties see any substantive merger issue under the legislation.

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In most cases, the preferable time to challenge a potentially anti-competitive merger is before the proposal is completed. Once the parties have merged their assets and operations, it becomes more difficult to return the parties to their pre-merger position in the market. Without some form of pre-notification, the Director's ability to make a preliminary assessment of the competitive impact of large mergers as well as the Director's ability to take the necessary steps to stop an anti-competitive merger before it is consummated would be seriously constrained.

Specialization Agreements

Section 57 of the Act defines a specialization agreement as an agreement where each party agrees to discontinue producing an article or service on the condition that the other party also agrees to discontinue producing an article or service. Such agreements allow firms to reorganize production and enjoy efficiency gains made possible from longer production runs.

Parties may apply to the Competition Tribunal, on notice to the Director, for an order to register such an agreement. Registration provides an exemption from the conspiracy and exclusive dealing sections of the Act. The Tribunal will register an agreement only if the parties have demonstrated that the agreement is likely to bring about gains in efficiency that will be greater than, and will

offset, the effects of any prevention or lessening of competition that will otherwise result. It must also be shown that the gains in efficiency could not be achieved through means other than such an agreement.

Tied Selling, Exclusive Dealing and Market Restriction

The tied selling, exclusive dealing and market restriction provisions of the Competition Act continue virtually unchanged from those in the Combines Investigation Act.

Exclusive dealing occurs when a supplier engages in a practice of requiring or inducing a purchaser to deal only or primarily in particular products. Tied selling occurs when a supplier engages in a practice of requiring a customer, as a condition of obtaining a product, to purchase any other product, or to refrain from dealing in other products of different brands, or inducing a customer to meet those conditions by offering to supply a product on more favourable terms. Market restriction occurs when a supplier engages in a practice of imposing restrictions on a customer to deal only in a defined territorial market, or exacting a penalty when the customer does not abide by the restriction. Where any of these practices is engaged in by a major supplier or is widespread in a market with the result that competition is or is likely to be lessened substantially, the Tribunal may issue a remedial or prohibitive order. Section 49(4) of the Act sets out certain conditions under

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which the Tribunal shall not make an order. Some exemptions are available when tied selling occurs as a result of a reasonable technological relationship or when exclusive dealing or market restriction occur for a reasonable period in order to facilitate entry of a new supplier or product. As well, any of these practices are exempt among affiliated companies.

Thus, the new Act contains a number of instruments which can be used to address the concerns commonly raised in connection with market concentration, including some which flow from aggregate concentration, and conglomeration.

5. <u>The Bureau's Experience in Merger Cases</u>

Since the passage of the new Act on June 19, 1986, the Bureau has examined or is currently examining various matters relating to alleged abuse of dominant market position, as well as certain practices such as tied selling. To date, however, no application to the Competition Tribunal has been made in relation to these particular situations, although that may change in the near future as certain examinations are completed. I would like to share with you the Bureau's experience with the Act in the area of mergers. It is here that we have seen the major impact of the legislation on corporate concentration in particular markets.

According to the Merger Register maintained by the Bureau, there were 948 mergers and acquisitions in Canada during the calendar year 1986. Since the passage of the Competition Act there have been 833 mergers and acquisitions.

The vast majority of these mergers have had either a beneficial or neutral impact on the economy. However, a small proportion of these mergers may have an adverse effect on competition and future economic performance. In this context the Bureau has examined, mostly in a summary fashion, over 400 mergers since last June, many of which are connected with applications under the Investment Canada Act. Of these, 67 mergers raised issues which required more extensive examination by the Bureau. These examinations under the Act have either been completed or are currently ongoing. The following is a breakdown of the status of these cases:

<u>Statistics - June 19, 1986, to July 17, 1987</u>

Mergers examined in a significant fashion	67	matters under Competition Act have been examined or are still ongoing
Closed - conclusion of no issue under the Act	23	
Proceeded under Program of Compliance	16	
Proceeded under Advance Ruling Certificate	4	

Parties abandoned merger as a result of Director's position	4	(includes Palm Dairies case)
Examination ongoing	19	
Applications to Tribunal	2	

From this statistical breakdown, it should be apparent that the Bureau is exploring all available avenues to resolve merger cases. The consultation and negotiation approach adopted by the Bureau is undoubtedly a more cost-effective manner of resolving merger issues under the new Act, where this is possible. As well, the Bureau attempts to resolve matters as expeditiously as possible in order to minimize costly delays.

Because of the confidentiality provisions of the Act and the potential commercial hardship the disclosure of sensitive corporate information may cause, the discussion of many merger cases must necessarily be in general terms. I will, however, describe some salient features of the Bureau's experience with the new merger provisions and discuss specific aspects of selected cases. This discussion is intended to illustrate the effect that the new legislation is having on situations of potentially anti-competitive market concentration.

The initial experience of the Bureau with the new merger provisions, albeit brief, is encouraging. In most of the cases that have given rise to extensive examination, the

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parties have come forward voluntarily, sometimes well in advance of the public announcement of the transaction. This is a practice we hope to foster and encourage and is complementary to the Bureau's "open door" and compliance approach toward implementation of the Act.

The Act is certainly requiring members of the business community and their counsel to carefully examine the competition implications of a proposed merger. Some commentators have suggested recently that business people may be reluctant to proceed to the Tribunal, preferring instead to see if the Director's concerns can be alleviated through negotiation. This may in part be due to the uncertain result if the matter were referred to the Tribunal, and in part because the ensuing process may lead to discussion of commercially sensitive information. In addition, the delay in completion of the transaction may be a significant factor.

The provisions of the Act do not distinguish between different types of mergers: horizontal, vertical and conglomerate. The Bureau has examined all three types of mergers, though the majority of the substantive cases reviewed would be generally considered as horizontal mergers. This is because the focal point of analysis under the Act is the determination of the impact of a merger (or any other practice) on competition in a relevant market. While all

types of mergers may lessen competition, the prospects of this occurring are greater in a horizontal merger where simultaneous with control over a larger market share, there is also a reduction in the number of firms in the market. The combined market share of the firms contemplating a horizontal type of merger has ranged primarily between 33 percent and 100 percent. However, other factors such as the degree of import competition, barriers to entry and the market power of large buyers have also been integral to the Director's decision in many cases. Approximately half of the 67 merger-related matters that Bureau staff have reviewed to date meet the pre-notification thresholds contained in the Act. However, as I mentioned before, these provisions officially came into force only as of July 15, 1987.

A further observation is that prospective efficiency gains arising from particular mergers have also been raised by business people in a number of cases. Such gains were given significant weight in the decision-making process in three different merger cases relating to the tobacco, forest products and confectionery industries. However, in each of these cases, while the efficiency gains were viewed to be of significance, there were also other pro-competitive factors such as actual or potential competition from imports or

other firms which alleviated Bureau concerns regarding the lessening of competition arising from the merger.

In the four cases where the parties have abandoned completing a proposed merger, the new Act has had its intended deterrent effect. In each case, it was conveyed to the firms that the merger would, in the Director's view, result in substantial lessening of competition and that an application would be made by the Director to the Tribunal in order to remedy the situation. From what we can ascertain, the prospect of unsuccessful or uncertain, complex litigation, and not other reasons such as problems of obtaining necessary financing or failure to arrive at a specific transaction value, contributed to these mergers not being completed. In each of these cases, had the merger been consummated, the resulting market concentration would have been in excess of 60 percent, in some market segments close to 100 percent and, the number of firms in the market reduced from three to two or two to one. In other words, we were dealing with situations of already highly concentrated markets where this factor, coupled with others, suggested competition would be reduced substantially. The Act in these instances has certainly stemmed any tendency towards higher concentration levels in the relevant markets. It should not, however, be concluded that the Bureau's cut off position with respect to concentration or market share is 60

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percent or close to that figure. As is well known among economists, there is no defined critical concentration level which can be equated with lack of competition. It differs on a case-by-case basis.

I may add that I am also given to understand from my colleagues in private legal practice that the Act is discouraging corporate clients from pursuing mergers which are likely to raise significant competition issues under the new Act. In a number of instances I understand that legal counsel have advised against possible merger plans, having regard to the new legislation, and the plans have been abandoned even prior to consultations with my office. It appears the business community will now need to weigh more carefully in advance the prospective benefits and anti-competitive costs arising from a merger before proceeding with the transaction.

It has therefore become apparent to us that under our merger review process, a decision or likely decision by the Director to challenge a proposed merger can, in many instances, cause the parties to re-think the proposed transaction, possibly attempt to re-structure it or ultimately decide to terminate the proposal. The full public hearing before the Competition Tribunal, in an adversarial context, together with the inherent time delay are not encouraging factors for entrepreneurs seeking to close a major business

transaction. Thus, recognizing the significance of any decision by the Director to challenge a merger, I can assure you that we are proceeding with great care and prudence in our merger review process, particularly at these early stages. We have committed all available resources to this function and we are making extensive use of outside experts where necessary to ensure we are making properly informed decisions. At the same time, recognizing the significance of the issuance of a binding Advance Ruling Certificate by the Director when we are doing prospective merger analysis -- that is, predicting the likely effects of a merger on a market -- we have also approached this new function with great care. As the legislation provides a three-year limitation period to challenge a merger in whole or in part, we want to be faced with a clear prospect of the merger not lessening competition substantially in the relevant market in that period before such a Certificate would generally be issued. In cases where there is not sufficient certainty, the merger will usually proceed under a compliance or comfort letter, which does not have the same binding effect as an Advance Ruling Certificate.

6. <u>The Palm Dairies and Safeway Cases</u>

I would like to share some views of the Palm Dairies Case, a transaction on public record, where the parties

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abandoned a proposed merger. On June 17, 1986, two days before the new Act was proclaimed in force, the four major western dairy co-operatives agreed to jointly purchase their major competitor, Palm Dairies. The case raised an interesting and difficult issue of whether the Act applied, since the purchase and sale agreement was signed two days before the Act came into force, but was to close in July 1986. The Director's position was that the Act did apply as the merger was not substantially completed before June 19th. Moreover, control of Palm by the co-operatives was a result we were not prepared to accept. Concentration levels would have been raised on average from 60 to 75 percent with a high of over 90 percent in selected product lines and market segments. After extensive discussions, and in order to avoid taking an unnecessary risk on the unique jurisdictional issue, a detailed and comprehensive settlement was worked out which removed our major concerns about the merger. The terms of settlement sought to maintain competition by requiring that Palm be operated independently of the co-operatives with separate management in place and protective provisions against disclosure of confidential information, among other terms.

The settlement was conditional on it being approved by the Tribunal by way of a consent order. At its initial hearing, the Competition Tribunal delivered interim reasons

wherein it asked for argument on the unique jurisdictional issue and on the terms of the proposed order. After appointing an amicus curiae, and hearing further argument, the Competition Tribunal delivered reasons wherein it expressed concern about the perpetual, mandatory nature of the arrangement, as well as the complexity, vagueness and effectiveness of some of the terms it contained. The Tribunal declined to grant the consent order. The jurisdictional issue, however, was not addressed in its decision. After initially appealing the decision, we decided it was preferable to leave the issues pertaining to the interpretation and application of the new consent order provisions to another day, if necessary. Therefore, as the conditional settlement was not approved, I returned to my original position that the proposed acquisition was not acceptable and the new Act applied. In the end, the parties decided to abandon the proposed acquisition, some seven months after they originally signed the purchase and sale agreement. Although this was not a typical case, it is an example of the new Act having a distinct impact in avoiding substantial market concentration in one industry in western Canada.

In another recent case, the Canada Safeway-Woodwards food stores acquisition, it is too early to state exactly what impact the Bureau's action will have on market concentration. While the acquisition has been allowed to proceed under specific terms, and in that sense Canada Safeway will

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acquire Woodwards stores' market share, the Director has required certain undertakings from Canada Safeway, one of which requires divestiture of 12 stores in six geographic markets. The divestitures, which are to be accomplished in a period of 18 to 24 months or less, will facilitate entry of new firms or expansion of other existing firms through those store locations. This is expected to result in little change in concentration in the retail grocery products industry in the geographic markets of primary concern to us. Upon fulfilment of the undertakings, the level of market concentration is not, in any event, presently expected to increase significantly in those areas; however, since we are dealing with prospective analysis in a number of geographic markets the actual effects remain to be seen. By allowing the merger to proceed in this fashion we have attempted to minimize the disruption to suppliers, employees and consumers who would benefit from the ongoing operation of those stores, albeit by a new entity in the future. This decision was made having regard, in part, to the distinct possibility that those Woodward food stores might have closed if the Safeway acquisition had been blocked.

The 18- to 24-month period allowed for divestiture is specific to this case only and resulted from particular market and labour situations. While the terms of the undertakings and representations alleviate our present concerns, the various markets, including but not limited to the six

where divestitures are to occur, will be closely monitored. In this regard, I have reserved the right to bring an application to the Tribunal if the merger ultimately produces a result which is not acceptable under the present law.

7. Conclusion

I wish to conclude by re-affirming that, in my view, the Competition Act is having its intended deterrent effect. The Act provides for flexible instruments which can be applied to stem corporate merger activity that results in higher levels of market concentration and which may adversely affect competition. At the same time, the Act does not inhibit those transactions which are likely to generate significant efficiencies which offset any resulting anti-competitive effects. In addition, other provisions relating to abuse of dominant market position, specialization agreements and practices such as predatory pricing and tied selling are some of the legislative tools available to remedy situations that may give rise to abuse of market power. Over time, as our experience with the new law develops, I am confident that any concerns which may exist regarding corporate concentration in particular markets will be alleviated.

(Version française disponible)

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Speech

Government of Canada Gouvernement du Canada

S-87-16

OPENING REMARKS

BY

THE HONOURABLE HARVIE ANDRE

MINISTER OF CONSUMER AND CORPORATE AFFAIRS CANADA

FOR A PRESS CONFERENCE ON PROPOSED CHANGES

TO THE

COPYRIGHT ACT

OTTAWA, MAY 27, 1987

Canada

We have called this press conference today to explain important changes to the Copyright Act. Recognizing that copyright has an important role to play in the culture and economy of this country, the government is undertaking a complete overhaul of the Act. This is being done under the joint direction of the Minister of Communications and myself. The revision will reflect changes in technology and in the economy since the Act came into force in 1924. We are working to strike a healthy balance between copyright owners and users. If done well -- and I am convinced that this first step takes us in the right direction -- we will meet our dual objectives to encourage and reward individual initiative and to spur economic growth in copyright industries.

Again, I want to point out that these proposed changes represent the first step in a comprehensive revision of the Act and many highly complex issues had to be addressed. Rather than wait until all of these could be resolved, the government has decided to proceed with revision of the Act in two phases instead of presenting a single omnibus Bill. I will outline the provisions of the Act dealing with computer programs, piracy and the difference between copyright and industrial design; but first I would like to ask my colleague, Miss MacDonald, to address some of the major changes we are proposing.

As I mentioned earlier, I would like to focus on the three provisions covering:

- explicit copyright protection for computer programs,
- increased penalties to deter piracy, and
- clarification of the relationship between copyright and industrial design.

When the present Copyright Act was drafted in 1921, computers had not been invented, so, naturally it does not contain any provisions that specifically cover computer programs.

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This has created uncertainty — and this uncertainty is discouraging software development and the creation of new jobs. The revised law will be consistent with recent legislation in the United States, the United Kingdom, France, Japan and Australia, and will serve as an incentive to develop Canadian industry and for foreign industry to invest in Canada. It will help in securing and enhancing Canada's production and export of computer programs.

The Bill also addresses the problem of piracy. Film, record and computer software piracy represents a rapidly growing criminal activity which harms copyright producers in Canada and discourages new creative activity. Piracy in video cassettes may account for as much as 15 to 20 percent of retail sales. In the recording industry, piracy may amount to over $40 million. Estimates for the software industry vary widely, but for some popular software packages there may be at least one pirated copy in use for every package authorized by the publisher.

Piracy is a major problem. Creators who have developed products legitimately are denied a fair return on their considerable investment of money, time and effort. Piracy costs Canada legitimate investments and jobs by draining millions of dollars from Canadian copyright industries. It harms our cultural and high technology sectors.

Under the new Act, increased criminal penalties, including fines of up to $1 million and jail sentences of up to five years, will send a strong signal that piracy will not be condoned in Canada. The penalties show that this government is serious in its efforts to protect Canadian initiative and industry.

The relationship between industrial design and copyright is a complex one. Recent court decisions have created confusion between Canada's copyright and industrial design laws.

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Take, for example, an innovator who develops a new tailpipe to exactly fit the underbody of a new car. The courts have indicated that it may be possible to give that tailpipe copyright protection, based on the original drawing. If so, only that designer could make similar tailpipes, for life plus 50 years, unless he or she authorized others to do so, through a licence with payment of royalties. Such a situation would restrict competition and raise prices to consumers.

Competition among makers of ordinary mass-produced items should not be unduly hampered. The new amendment provides an objective means of determining whether an article can be protected by copyright, industrial design, both or neither.

The provisions I have outlined set the direction for the course I want to chart for the protection of intellectual property, the dissemination of technology, and the creation of an environment conducive to research investment and technology transfer. The measures to protect computer programs will give Canadian software houses and programmers the certainty they require to make the investment in time and money necessary to compete in this highly competitive field.

Canada's cultural, technological and manufacturing industries are growing rapidly. We rank among the leaders in industrialized nations. We intend to protect this position and to encourage our industry to prosper at home and around the world.

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May 1987

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Speech

Consumer and Corporate Affairs Canada | Consommation et Corporations Canada

S-87-27

THE MERGER PROVISIONS OF THE NEW COMPETITION ACT:
THE EXPERIENCE TO DATE

Notes for an address

by

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and

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Montréal, September 19, 1987

Canada

Check against delivery

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1. INTRODUCTION

I am pleased to have been invited to participate in your conference today. The subject of mergers and acquisitions has gained greater importance and has become more challenging both to the business community and to those responsible for public policy. The opportunity to share with you our experience in applying the merger provisions of the Competition Act is a welcome one.

Since the proclamation of the Competition Act fifteen months ago, we have observed a greater awareness of competition law and, just as significantly, a greater desire to become more familiar with what most observers agree is a complex field of law.

Today, I intend to initially discuss the main features of the merger provisions of the new Competition Act and then describe our experience to date in the application of these provisions. In that regard, it is my view that although the legislation has only been in force for a relatively brief period of time, it is already having its intended effect of inhibiting mergers that are likely to adversely affect competition while, at the same time, allowing those transactions to proceed that are likely to generate significant efficiencies and net economic benefits.

2. OBJECTIVES OF THE COMPETITION ACT

To fully appreciate the content and application of the new merger provisions, it is useful to discuss the basic objectives of the Competition Act. These objectives flow from the purpose clause (section 1.1) and contain a number of underlying themes which thread together the various provisions of the Act.

First and foremost, the Act is a general law of general application which seeks to maintain and strengthen the role of market forces, thereby encouraging maximum efficiency in the use of economic resources. Competition is not regarded as an end in itself but as a vehicle in the achievement of economic efficiency.

Second, the law recognizes the importance of international trade in exerting competitive pressures in the domestic economy and in providing export opportunities for Canadian firms.

Third, the need to have large firm size to achieve economic efficiencies is explicitly recognized and is not necessarily viewed as being adverse to competition. The size of a firm per se is not the primary concern under the Act, but rather the use and abuse by a firm of its market power.

Fourth, where through the process of a merger or a specialization agreement large firm size is necessary, the

efficiency gains are to be counterbalanced with the impact on competition. The efficiency gains have to offset and be greater than the adverse effects the new larger firm may have on competition.

Fifth, the Act seeks to establish a clear, equitable and consistent set of standards aimed at preventing abuses of market power, and at ensuring firms compete effectively and fairly in providing customers with product and quality choices at the lowest possible prices.

These themes -- efficiency, adaptability and international competitiveness -- have been designed to meet the unique needs and characteristics of the Canadian economy. Canada's small and geographically segmented markets often lead to high levels of market concentration. Despite their large size relative to the domestic market, many Canadian companies are still too small to achieve efficient scales of production and therefore may find it difficult to compete with foreign firms at home and abroad. Industries and firms may need to rationalize production facilities in order to be competitive.

3. THE NEW MERGER LAW

In recognition of these themes, the new law governing mergers represents a significant departure from the previous law. The main differences may be highlighted as follows:

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First, the merger law is decriminalized. Not only did the old law prove to be virtually unenforceable -- the Crown never succeeded in a contested merger case in its 76-year history -- it was also an unrealistic and ineffective way of attempting to regulate business behaviour. In contrast with the previous legislation, the new law provides the flexibility necessary to ensure that all relevant factors are considered in a timely fashion. Moreover, the consideration of those factors occurs in an administrative law environment, not a criminal court. This removes the necessity of meeting the criminal burden of proof. Proving the prospective effects of a merger beyond a reasonable doubt was a most difficult task to say the least.

Second, Bill C-91 created a new Competition Tribunal to adjudicate merger cases. The Tribunal is a unique Canadian institution composed of both Federal Court judges and lay members. It was designed to respond to the twin concerns that it be capable of, and be perceived as, providing fair and learned decisions and, at the same time, be aware of and sensitive to the multitude of factors at play in the real world of economics and commerce.

Third, the merger provisions provide guidance by identifying specific factors that the Tribunal may take into account in making a finding in any particular case. Moreover, the finding is to be based on a new, more specific test under section 64, which is unlike the rather ambiguous

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public detriment test under the old law. The factors actually taken into account by the Director and the Tribunal, and the weight given to each, will, of course, vary with the circumstances of the case and the relevance of a particular factor to the merger in question. In most cases, no one factor will be decisive and all the factors will have to be weighed together to arrive at a conclusion on the competitive impact of the merger.

Fourth, the prenotification provisions provide a mechanism to allow the effective application of the law before it is too late. This need is balanced against the importance to firms that they be able to get on with their business by setting time guidelines for the Director to decide if he will challenge a transaction.

Fifth, the law provides for a broader range of remedies. The Tribunal can issue interim or conditional orders if necessary, as well as final orders to prohibit or dissolve a merger or to require any other action that it may find necessary. The addition of specific consent order provisions provides an important degree of flexibility for the Tribunal in the resolution of merger cases.

Sixth, the law allows for greater certainty and compliance by providing an opportunity for parties to seek an advance ruling certificate from the Director. This new procedure, coupled with the provisions for consent orders, enables the Director and the parties to a merger to consider

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ways of achieving a negotiated settlement, thereby avoiding a protracted and costly hearing in appropriate cases.

4. THE FACTORS TO BE CONSIDERED IN ASSESSING A MERGER

The basic test for assessing a merger under the Competition Act is set out in section 64. The test to be applied is whether the merger or proposed merger prevents or lessens or is likely to prevent or lessen competition substantially.

Clearly, an important first step in analyzing the competitive impact of a merger is to identify the relevant markets in which the parties participate. If there is no overlap, or no market in which the parties compete with one another, there is not likely to be an issue in the usual case.

The Act makes it clear that the Tribunal cannot find a substantial lessening of competition based solely on evidence of increased concentration resulting from the merger. In other words, cases cannot be decided simply by adding up the market shares of the parties. That is not to say that market share and the increase in industry concentration are not important. They are not, however, the sole determinants and must be considered along with other qualitative aspects.

One factor that the Tribunal may take into account in assessing a merger is the extent of foreign competition. The presence of foreign competitors or imports in the market, or the likelihood of such, may have a significant effect on competition after the merger is completed.

Another factor is whether the firm being acquired, or some part of it, has failed or is likely to fail. While a true failing firm does not, in itself, provide a complete defence, the Tribunal may want to consider the possibility that blocking such a merger may result in the removal of assets from productive use in the economy.

Will the merger result in the removal of a vigorous and effective competitor? Are there significant barriers to the entry of new competitors in the market? Will there be effective competition remaining after the acquisition? These are only some of the many questions that the new law invites us to ask. However, the list of factors in section 65 is not exhaustive. In some cases, the Tribunal may well be asked to examine other considerations, such as the countervailing market power of buyers or a history of anti-competitive behaviour of the merging parties.

The new Act provides for an explicit statutory recognition of efficiency gains as an exception to the application of the merger law. By incorporating an efficiency exception, the Act clearly recognizes that the restructuring of

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an industry can, in certain circumstances, result in net benefits for the economy, even though such a merger may result in higher levels of concentration.

Thus, section 68 of the new merger law provides that the Tribunal will allow the merger to proceed, even though the merger would lessen competition substantially, when the parties can satisfy the Tribunal that the merger will bring, or is likely to bring about, gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition resulting from the merger and that such efficiency gains would not likely be attained in other ways if an order prohibiting the merger were to be made.

Efficiency gains that may be relevant in my view include economies of scale and scope, plant specialization, and lower transportation costs, among others; the onus for proving these different sources of efficiencies rests with the acquiring firm. In most cases, these savings translate into lower unit output costs. Whether such gains would override a lessening of competition would ultimately be a question for the Tribunal to decide, based on the circumstances and particular factors of each case. It should be noted that cost savings that result from a mere redistribution of income as opposed to a real savings in resources would not be considered to be efficiency gains under the

legislation. Tax savings associated with a merger, for example, are tranfers from the general taxpayers to the merged firm and would not, in my view, qualify as efficiency gains.

A somewhat similar recognition of efficiencies is currently being taken by the U.S. Department of Justice. I understand that it is one of the more difficult tasks they have experienced in their merger analysis since sometimes competition-lessening "apples" have to be balanced against efficiency "oranges." Our initial experience over the last fifteen months reflects a similar challenge in undertaking this rather difficult balancing process. While efficiency arguments have been advanced in some mergers the Bureau has reviewed, we have not yet encountered a situation where efficiency gains have resulted in an "even weight" on the scales.

In addition to the efficiency exception, section 67 of the Act provides for a limited exemption for joint ventures formed for the purpose of undertaking a specific project or a program of research and development. This special recognition in the merger provisions of the value of joint ventures is desirable because of their economic importance, particularly in the Canadian oil and gas industry, and their recent prominence in research and development programs and export consortia. The joint venture exemption, however, has

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been carefully drafted to ensure that anti-competitive joint ventures remain subject to the merger law and that parties do not have an incentive to restructure transactions to escape the application of the law.

5. PRE-NOTIFICATION AND PROCEDURES

While it is not my intention to dwell on the procedural aspects of merger review or on the merger pre-notification provisions, I do want to highlight some of the more important points. In most cases, the preferable time to challenge a potentially anti-competitive merger is before it is completed. Once the parties have merged their assets and operations, it becomes difficult to return the parties to their pre-merger position in the market. Without some form of pre-notification, the Director's ability to make a preliminary assessment of the competitive impact of the merger, as well as the ability to take the necessary steps to stop an anti-competitive merger before it is consummated, would be seriously constrained. In drafting the pre-notification provisions, a balance was struck between the Director's need to be advised beforehand and the desire of the parties to be able to complete their transaction with a minimum of bureaucratic delay. Prenotification therefore applies only to large transactions where the parties'

combined assets or revenues exceed $400 million and the value of the acquisition itself exceeds $35 million in assets or revenues, except in the case of amalgamations where the transaction threshold is $70 million. The waiting periods are short, ranging from 7 to 21 days. Also, appropriate exemptions have been included that remove business transactions which would rarely, if ever, raise competition issues.

These pre-notification provisions came into effect on the fifteenth of July of this year. While many mergers will not fall within the pre-notification provisions, it should be noted that the substantive merger law applies to all types of mergers, regardless of their size, and that the Director can challenge a merger up to three years after it is substantially complete, unless an Advance Ruling Certificate has been issued.

As I mentioned at the outset, one of the advantages of shifting the merger law from the criminal law environment is that it encourages business people to come forward at an early stage with their proposal to see if it will raise competition problems and, if so, to explore whether the transaction can be restructured to remove those concerns. I can tell you that I certainly welcome opportunities to resolve potential problems in a cost-effective and expeditious manner. It is my intention to make greater use of negotiated settlements in appropriate cases, particularly in

the context of the merger and other administrative law provisions. After all, the negotiation process is less expensive and time consuming than protracted litigation for all parties concerned, be they from government or from the business sector, and may result in equally effective resolution. Where a settlement or compliance with the Act is reached, it is likely that one of three vehicles will be employed: an advance ruling certificate, a compliance opinion or an application for a consent order.

If the parties are confident that the merger will raise no competition issues but want greater certainty, they can ask for an advance ruling certificate. Section 74 of the Act provides that the Director may issue a certificate where he is satisfied that he would not have sufficient grounds to apply to the Tribunal. The certificate precludes the merger from being challenged if it is substantially completed within one year after the certificate is issued and if there is no substantial change in the information upon which the certificate was based. An advance ruling certificate may be issued on the basis of certain terms or undertakings by the purchaser, depending on the circumstances of the case.

Another avenue under which a proposed merger can be reviewed is through the Director's Program of Compliance. In one recent case, for example, the potential purchaser sought our views several months before approaching the

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vendor to ensure that once negotiations for purchase commenced, they could proceed quickly without any unforeseen intervention from my office. A letter of opinion under the Program of Compliance indicates whether a proposed transaction, based on the information provided, would cause me to initiate an inquiry under the Act. The letter will indicate where the concerns, if any, may lie. If concerns are raised, and the party then satisfies those concerns, sometimes by way of undertakings, compliance with the Act can usually be achieved without the need for other proceedings. In some instances, we will prefer to give a "no issue" compliance opinion rather than an advance ruling certificate. This will allow us to monitor a situation which raises no immediate concern but, because of the changing state of the market or other factors, might still raise an issue within the three-year period in which the Director could challenge the merger or a portion of it.

A further mechanism for negotiated settlement is the consent order. Under section 77, the Tribunal may grant an order, where terms have been agreed upon by the parties and the Director, without the necessity of going through a full, contested hearing. Consent orders, as opposed to undertakings, are likely to be used where it is necessary to ensure enforceability of the terms of the order over a comparatively long period of time or where variation of the terms may prove necessary. It should be noted that the ultimate decision to grant a consent order rests with the

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Tribunal, while the authority for issuing an advance ruling certificate rests solely with the Director.

Thus, from this brief overview, it is evident that the new Act provides for flexibility and a range of different approaches toward resolving competition issues that may arise from merger cases.

6. THE BUREAU'S EXPERIENCE IN MERGER CASES

I would now like to share with you some aspects of our experience with the new Act in the area of mergers.

According to the Merger Register maintained by my office, there were 948 mergers and acquisitions in Canada during the 1986 calendar year. Since the passage of the Competition Act, on June 19, 1986, there have been approximately 1 200 mergers and acquisitions.

The vast majority of these mergers have had either a beneficial or neutral impact on the economy. However, a small proportion of these mergers may have had an adverse effect on competition and future economic performance. In this context, the Bureau has examined, mostly in a summary fashion, over 400 mergers since June of 1986, many of which are connected with applications under the Investment Canada Act. Of these, 86 mergers raised issues that required more extensive examination. These examinations under the Act

have either been completed or are ongoing. The following is a breakdown of the status of these cases:

<u>Statistics -- June 19, 1986, to September 18, 1987</u>

Mergers examined in a significant fashion	86
File closed - concluded as posing no issue under the Act	31**
Processed under Program of Compliance	20**
Processed under Advance Ruling Certificates	7**
Parties abandoned proposed merger as a result of Director's position	5*
EXAMINATIONS ONGOING: (excludes matters currently before Tribunal)	22
Applications to Tribunal	2*

Notes:

* Includes Palm Dairies Case

** Statistics relate to mergers and acquisitions which may be proposed or completed. In some instances proposed transactions which were the subject of review were not completed for reasons unrelated to the Director's decision.

From this statistical breakdown, it should be apparent that we are exploring all available avenues to resolve merger cases. The consultation and negotiation approach where possible and appropriate is undoubtedly a more cost-effective manner of resolving merger issues under the new

Act. In addition, we attempt to resolve matters as expeditiously as possible in order to minimize costly delays. I may add that our merger review process entails extensive use of in-house expertise as well as that provided by outside industry, financial, economic, legal and other consultants, to the extent necessary in certain cases.

Because of the confidentiality provisions of the Act and the potential commercial hardship the disclosure of sensitive corporate information may cause, the discussion of many merger cases must necessarily be in general terms. I will, however, describe some salient features of our experience with the new merger provisions and discuss specific aspects of selected cases. This presentation is intended to illustrate the effect that the new legislation is having on potentially anti-competitive mergers.

The initial experience with the new merger provisions, albeit brief, is encouraging. In most of the cases that have given rise to extensive examinations, the parties have come forward voluntarily, sometimes well in advance of the public announcement of the transaction. This is a practice we hope to foster and encourage and is complementary to our "open door" and compliance approach toward implementation of the Act.

The Act is certainly requiring members of the business community and their counsel to carefully examine the competition implications of a proposed merger. Some commentators have suggested recently that business people may be

reluctant to proceed to the Tribunal, preferring instead to see if the Director's concerns can be alleviated through negotiation. This may in part be due to the uncertainty of the result that would follow if the matter were referred to an adjudicative body, and in part because the ensuing process may lead to discussion of commercially sensitive information. In addition, the delay in completion of the transaction may be a significant factor.

The provisions of the Act do not distinguish between different types of mergers: horizontal, vertical and conglomerate. We have examined all three types of mergers, though the majority of the cases reviewed have been horizontal mergers. This is because the focal point of analysis under the Act is the determination of the impact of a merger (or any other practice) on competition in a relevant market. While all types of mergers may lessen competition, the prospects of this occurring are greater in a horizontal merger where along with control over a larger market share, there is also a reduction in the number of firms in the market. In the cases we have examined, the combined market share of the firms contemplating a horizontal merger has ranged primarily between 33 percent and 100 percent. However, other factors such as the degree of import competition, barriers to entry and the market power of large buyers have also been integral to my decision in many cases. You may also be interested in knowing that almost half of

the 86 merger-related matters that we have reviewed to date met the pre-notification thresholds contained in the Act.

A further observation is that prospective efficiency gains arising from particular mergers have also been raised by business firms in a number of cases. Such gains were given significant weight in the decision-making process in three different merger cases relating to the tobacco, forest products and confectionery industries. However, while the potential efficiency gains in each of these cases were viewed to be of significance, there were also other pro-competitive factors, such as actual or potential competition from imports or other firms, that alleviated our concerns regarding the lessening of competition arising from the merger.

In the five cases where the parties have abandoned a proposed merger, the new Act has had its intended deterrent effect. In each case, it was conveyed to the firms that the merger would, in my view, result in a substantial lessening of competition and that an application would be made to the Tribunal. I understand that in each case the proposed merger was then abandoned due entirely or partially to my position. From what we can ascertain in most cases, the prospect of unsuccessful or uncertain, complex litigation, and not other reasons such as problems of obtaining necessary financing or failure to arrive at a specific transaction value, contributed to the decision not to

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proceed with these mergers. In each of these cases, had the merger been consummated, the resulting market concentration would have been in excess of 60 percent, in some market segments close to 100 percent, and the number of firms in the market reduced from three to two or from two to only one. In other words, we were dealing with situations of already highly concentrated markets where this factor, coupled with others, suggested competition would be lessened substantially. The Act in these instances has certainly stemmed any tendency towards higher concentration levels in the relevant markets. It should not, however, be concluded that we have established any fixed cut off position with repect to concentration or market share. As is well known among economists, there is no defined critical concentration level that can be equated with lack of competition. It differs on a case-by-case basis.

I may add that I am also given to understand from my colleagues in private legal practice that the new legislation is discouraging corporate clients from pursuing some mergers that are likely to raise significant competition issues under the new Act. In a number of instances, I understand that legal counsel have advised against possible merger plans, having regard to the new legislation, and the plans have been abandoned even prior to consultations with my office. It appears the business community will now need to weigh more carefully in advance the prospective benefits

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and anti-competitive costs arising from a merger before proceeding with the transaction.

It has therefore become apparent to us that under our merger review process, a decision or likely decision by the Director to challenge a proposed merger can, in many instances, cause the parties to re-think the proposed transaction, possibly attempt to restructure it or ultimately decide to terminate the proposal. The full public hearing before the Competition Tribunal, in an adversarial context, together with the inherent time delay are not encouraging factors for entrepreneurs seeking to close a major business transaction. Thus, recognizing the significance of any decision by me to challenge a merger, I can assure you that we are proceeding with great care and prudence in our merger review process, particularly at these early stages. We have committed all available resources to this function and, as previously mentioned, we are making extensive use of outside experts where necessary to ensure we are making properly informed decisions. At the same time, recognizing the significance of the issuance of a binding advance ruling certificate by the Director when we are doing prospective merger analysis -- that is, predicting the likely effects of a merger on a market -- we have also approached this new function with great care. As the legislation provides a three-year limitation period to challenge a merger in whole

or in part, we want to be certain that the merger will not lessen competition substantially in the relevant market before such a certificate would generally be issued. In cases where there is not sufficient certainty, the merger will usually proceed under a compliance or comfort letter, which does not have the same binding effect as an advance ruling certificate.

7. THE PALM DAIRIES, SAFEWAY AND NESTLE CASES

I would like to share some views of the Palm Dairies case, a transaction on public record, where the parties ultimately abandoned a proposed merger. On June 17, 1986, two days before the new Act was proclaimed in force, the four major western dairy co-operatives agreed to jointly purchase their major competitor, Palm Dairies. The case raised an interesting and difficult issue of whether the Act applied, since the purchase and sale agreement was signed two days before the Act came into force, but was to close in July 1986. My position was that the Act did apply as the merger was not substantially completed before the nineteenth of June. Moreover, control of Palm by the co-operatives was a result we were not prepared to accept. The merged entity would have control of over 80 percent of the market for milk in most of the provinces affected. After extensive discussions, and in order to avoid taking an unnecessary risk on

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the unique jurisdictional issue, a detailed and comprehensive settlement was worked out which removed our major concerns about the merger. The terms of settlement sought to maintain competition by requiring, among other terms, that Palm be operated independently of the co-operatives with separate management in place and with protective provisions against disclosure of confidential information.

The settlement was conditional on it being approved by the Tribunal by way of a consent order. At the initial hearing, the Competition Tribunal delivered interim reasons wherein it asked for argument on the jurisdictional issue and on the terms of the proposed order. After appointing an _amicus curiae_, and hearing further argument, the Competition Tribunal delivered reasons wherein it expressed concern about the perpetual, mandatory nature of the arrangement, as well as the complexity, vagueness and effectiveness of some of the terms it contained. The Tribunal declined to grant the consent order. The jurisdictional issue, however, was not addressed in its decision. After initially appealing the decision, I decided it was preferable to leave the issues pertaining to the interpretation and application of the new consent order provisions to another day, if necessary. Therefore, as the conditional settlement was not approved, I returned to my original position that the proposed acquisition was not acceptable and the new Act applied. In the end, the parties decided to abandon the proposed acquisition, some seven months after they originally signed the purchase and sale agreement. Although this

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was not a typical case, it is an example of the new Act having a distinct impact in avoiding substantial market concentration in one industry in western Canada.

In another recent case, the Canada Safeway/Woodward's food stores acquisition, it is still too early to state exactly what impact the Bureau's action will have on market concentration. While the acquisition has been allowed to proceed unchallenged under specific terms, and in that sense Canada Safeway will acquire Woodward's stores' market share, certain undertakings have been given by Canada Safeway, one of which requires divestiture of 12 stores in 6 geographic markets. The divestitures, which are to be accomplished in a period of 18 to 24 months or less, will facilitate entry of new firms or expansion of other existing firms through those store locations. This is expected to result in little change in concentration in the retail grocery products industry in the geographic markets of primary concern to us. Upon fulfilment of the undertakings, the level of market concentration is not, at present, expected to increase significantly in those areas. However, since we are dealing with prospective analysis in a number of geographic markets, the actual competitive effects on those markets remain to be seen. By allowing the merger to proceed in this fashion, we have attempted to minimize the disruption to suppliers and others who would benefit from the ongoing operation of those stores, albeit by a new entity in the future. This decision was made having regard,

in part, to the distinct possibility that those Woodward's food stores might have closed if the Safeway acquisition had been blocked.

The 18 to 24-month period allowed for divestiture is specific to this case only and resulted from particular market and labour situations. While the terms of the undertakings and representations alleviate our present concerns, the various markets, including but not limited to the six where divestitures are to occur, will be closely monitored. In this regard, I have reserved the right to bring an application to the Tribunal if the merger ultimately produces a result that is not acceptable under the Act.

Another very recent case relates to the supply of coffee to the food service sector which includes restaurants, hotels and other institutions. Initially, in this transaction Nestlé Enterprises Ltd. intended to acquire all three coffee supply divisions of Nabisco Brands Ltd.: "Club," which operates primarily in Ontario; "Melrose," in Manitoba and Saskatchewan; and "Dickson's" in Alberta and British Columbia.

Our examination, which included information obtained from a wide variety of sources, concluded that if the original transaction were to proceed, a substantial lessening of competition would result in the western Canadian markets. I conveyed to the firms my concerns in this regard.

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Major factors in my decision with respect to the original proposal included the loss of a vigorous and effective competitor, the lack of effective competition that would remain after the merger, the substantial barriers to entry confronted by new competitors, and the significant increases in concentration that would result in the four western Canadian provinces.

As a result of my position, Nestlé re-structured its transaction this past summer so that it would only acquire Nabisco's "Club" operations in Ontario; it also sought an alternative buyer for Nabisco's two coffee supply divisions in western Canada. Subsequently, General Foods, which had a much smaller share of the western market, agreed to purchase the two western Canadian coffee supply divisions. The re-structured transaction in relation to western Canada did not give rise to any substantial lessening of competition.

Although the combination of Nestlé's "Goodhost" and Nabisco's "Club" operations would increase market concentration in Ontario, I concluded that the lessening of competition in Ontario is not expected to be substantial. Notwithstanding this decision, we intend to monitor the industry during the three-year limitation period provided under the Act to ensure that a material change in circumstances does not alter this conclusion.

This case provides an example of how the new legislation enables the competitive state of markets in Canada to be preserved; moreover, it illustrates that these results

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can be achieved by means of an expeditious re-structuring of a proposed transaction without protracted and costly litigious proceedings.

CONCLUSION

I wish to conclude my presentation by reiterating that the merger sections of the new Competition Act provide for flexible, expeditious and effective approaches to resolve competition issues that may be raised by particular merger transactions. These provisions have been drafted so as to allow mergers that are likely to generate efficiencies and net economic benefits to proceed and to prevent those acquisitions that are likely to lessen competition substantially. The new merger law has been designed to meet the particular requirements of the Canadian economy by providing a clear framework for the control of anti-competitive mergers that have no significant redeeming features.

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Speech

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

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THE TREATMENT OF CO-OPERATIVE R&D ACTIVITIES

UNDER THE COMPETITION ACT

Notes for an Address

by

Howard I. Wetston

Senior Deputy Director of

Investigation and Research

Consumer and Corporate Affairs Canada

to the

Committee on Science and Technology

Canadian Manufacturers Association

Ottawa, March 4, 1988

It's a pleasure to be invited to meet with the members of the CMA Committee on Science and Technology.

Today I'd like to talk about the treatment of co-operative Research and Development (R&D) activities under the Competition Act. As you know, there's strong interest in supporting activities in this area by various federal departments.

My main message this afternoon is that R&D activities are generally viewed favourably under the Competition Act. One of the key objectives of the Act is to promote the dynamic efficiency and adaptability of the economy. Support and encouragement of R&D activities are essential to the fulfilment of this objective.

In some situations, co-operation among firms that normally compete with each other may be necessary to the successful conduct of R&D. The Competition Act has specific provisions intended to facilitate such activities, especially through the formation of joint ventures. These provisions provide the necessary scope for joint R&D activities that contribute to the efficiency, growth and competitiveness of the Canadian economy. At the same time, co-operative activities with anti-competitive effects that go beyond what is necessary to achieve a specific project may raise issues under the Act.

Co-operative research activities may take a variety of forms. There are specific collaborative projects and R&D

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programs undertaken by two or more firms -- commonly known as joint ventures. These are not permanent and do not involve the formation of a separate corporation. Some collaborative efforts may mean the formation of a separate corporation to develop and market a new product.

I would first like to discuss these types of activities in relation to the specific provisions of the Act dealing with joint ventures and mergers. Then I'll talk about the treatment of co-operative R&D activities and the conspiracy provisions of the Act. Finally, I'll say a few words about specialization agreements, export agreements and intellectual property licensing.

I. Specific provisions relating to joint ventures

Collaborative projects or programs of research that do not involve the formation of a separate corporation may qualify under the exception for joint ventures provided in section 67 of the Competition Act. The advantage of qualifying in this way is that the transaction is thereby excepted from the merger provisions of the Act, which could otherwise be an impediment to the venture. The merger provisions authorize the Competition Tribunal to prohibit or make other remedial orders respecting a broad range of acquisitions or business combinations that are found by the Tribunal to be likely to prevent or lessen lessen competition substantially.

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To qualify under section 67, a joint venture must satisfy a number of criteria. Essentially these require that: (1) the project or program would not likely have taken place in the absence of the combination; (2) no change in the control of any of the parent firms would result from the venture; (3) the parties establish a written agreement governing the contribution of assets to the venture and their continuing relationship; (4) the agreement restricts the range of activities to be carried on by the joint venture and provides for termination on completion of the project or program; and (5) the joint venture does not lessen competition except to the extent that is reasonably necessary to undertake and complete the project or program of research.

This last qualification requires some elaboration. A joint venture may legitimately involve some limitation of competition among the parent firms. This limitation may not, however, extend beyond what is necessary to complete the venture. Thus, including in the joint venture agreement restrictions on competition between the parent firms that are not reasonably related to the essential elements of the project could deprive it of the protection afforded by section 67. Some examples of restrictions that might be considered as going beyond this threshold could include covenants that bar the parent firms from engaging in independent research activity, clauses requiring discontinuance of the manufacture of existing products that may compete

with the product to be developed, requirements for the sharing of information about production costs, and restrictions on the licensing of technology not developed through the venture. In addition, any clauses in the agreement that have the effect of dividing up a market or fixing prices to be charged by the parent firms could clearly deprive the venture of the protection of section 67. Such clauses could also raise issues under section 32 of the Act, dealing with conspiracies in restraint of trade. I'll have more to say about this later.

To qualify under section 67, it's not necessary to make any formal application or comply with any registration process. The section can simply be raised as a defence if the Director of Investigation and Research brings an application to the Competition Tribunal respecting the activity. I should point out, however, that business people concerned about whether their collaborative activities would qualify as a joint venture under section 67 are welcome to meet with the Director or his representatives to discuss the matter. This could help avoid any formal proceedings under the Act.

I should note that the provision of special treatment for R&D joint ventures under section 67 of the Competition Act is somewhat analogous to the protection afforded such ventures in the U.S. under its National Cooperative Research Act of 1984. The U.S. legislation also contains a definition of joint ventures for the purposes of the Act, and

attempts to ensure that such ventures receive special treatment.

The U.S. legislation, however, is different from section 67 in its scope and legal effect. While the U.S. National Cooperative Research Act applies only to R&D joint ventures, the Canadian provision is applicable to joint ventures generally. Furthermore, while section 67 provides an exception for qualifying joint ventures from the merger provisions of the Competition Act, the U.S. legislation merely clarifies that qualifying joint ventures will be judged under a "rule of reason" and will not be considered illegal per se.

The U.S. National Cooperative Research Act also limits the civil liability for such ventures under the U.S. antitrust laws to single damages rather than treble damages. To receive this civil liability limitation, however, advance notice of the joint venture must be given to the U.S. Attorney General and the Federal Trade Commission.

Returning to the Canadian provisions, it's not possible to give more specific information relating to the application of section 67 since, perhaps surprisingly, to date there have been no cases brought to the attention of the Director of Investigation and Research. I suppose that underscores the importance of my task here today -- to draw attention to and explain section 67 and the favourable treatment afforded to qualifying R&D activities under this and other sections of the Competition Act.

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II. The treatment of co-operative R&D activities under the general merger provisions

Collaborative activities that involve the formation of a separate corporation are not eligible for the section 67 exception from the general merger provisions of the Act. However, this doesn't necessarily mean that they will be challenged by the Director of Investigation and Research. The merger provisions establish a flexible, case-by-case approach to the evaluation of business activities. The Act indicates that a merger may not be found to lessen competition substantially solely on the basis of evidence of concentration or market shares.

In determining whether a merger lessens competition substantially, the Competition Tribunal may take into consideration a broad range of economic factors. These can include the extent to which acceptable substitutes for products supplied by the parties to the merger are likely to be available, the existence of barriers to entry in the market, and the nature and extent of change and innovation in the market. In addition, section 68 of the Act provides that the Tribunal may not make an order respecting a merger where it finds that the merger is likely to result in gains in efficiency that will be greater than, and will offset, the effects of the lessening of competition. The Tribunal must also determine that the gains in efficiency would not likely be attained if an order is made.

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The assessment of joint ventures under these provisions involves similar considerations as the evaluation of the other types of mergers dealt with under the Act. In particular, it would begin with an analysis of the size and market share of the joint venture in relation to the parent firms and other participants in the market. At the same time, consideration would be given to factors such as the existence of barriers to entry and the availability of products from the foreign producers that would compete with the products to be developed and/or produced by the joint venture. Where appropriate, an evaluation would also be made of the likelihood of foreclosure of other firms from entry into the market due to the strength or market position of the joint venture. Similarly, close consideration would be given to the scope of the venture and the nature of any ancillary restraints imposed on the parties. Accordingly, the treatment of the venture could depend partly on whether it is purely concerned with research, or whether it also goes into aspects of the production or marketing of the products to be developed.

As an additional consideration, it should be noted that technological innovation is a potential source of gains in efficiency as contemplated in section 68 of the Competition Act. To the extent that co-operative R&D activities contribute to technological innovation that could not otherwise be achieved, this would be a consideration under the efficiency

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provisions of the Act. Accordingly, R&D activities involving the formation of a separate corporation may in some circumstances receive treatment similar to the protection available to joint activities not involving the formation of a separate corporation under section 67.

While it's not possible to make categorical statements about the types of joint ventures considered acceptable under the merger laws, due to the complexity of the considerations involved and the variation in the characteristics of individual markets, the following may give some general guidance.

At one extreme, a pure R&D joint venture with no ancillary restraints limiting independent research, production, marketing of products or licensing of technology developed by the parent firms outside the venture, probably wouldn't be considered anti-competitive under normal circumstances. By facilitating the development of new technology, such ventures are more likely to enhance than detract from competition in the marketplace.

At the other end of the spectrum, a joint venture that goes beyond research to encompass joint production and marketing of a new product in an industry characterized by high concentration, barriers to entry and an absence of foreign competition, might well be considered anti-competitive. This would depend on factors such as the availability of substitute products and the expected market

share of the venture in relation to the parent firms and other participants in the market. In this case, any covenants barring independent competition by the parent firms would most likely render the venture unacceptable, unless the venture could be shown to generate very substantial efficiency gains.

Between these extremes the assessment of joint ventures under the merger provisions would require a careful balancing of pro- and anti-competitive effects in particular cases.

In administering the merger provisions of the Act, the Director of Investigation and Research takes a flexible, compliance-oriented approach. Business people are encouraged to come in and discuss an actual or proposed acquisition or combination at any stage of the process. The purpose of such discussions is to arrive at mutually acceptable solutions to ensure compliance with the letter and spirit of the Competition Act, while avoiding the need for costly proceedings before the Competition Tribunal.

Compliance-oriented solutions in merger cases may take a number of forms. Section 74 of the Competition Act provides for the issuance by the Director of Advance Ruling Certificates in situations where he is satisfied on the basis of information provided by the parties that a proposed transaction would not give sufficient grounds to the Tribunal to issue an order blocking the transaction.

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Alternatively, parties may obtain an advisory opinion under the Director's Program of Compliance. Such opinions indicate whether, on the basis of information submitted, the Director would have grounds for an application to the Tribunal or to seek remedial action under other sections of the Act. Where the Director indicates that he would refer a proposed merger to the Tribunal, the parties may attempt to avoid such action by voluntarily agreeing to specific undertakings that will eliminate the anti-competitive features of the merger. In working out such a negotiated settlement, parties are likely to be asked to agree to the inclusion of such undertakings in a formal Consent Order to be issued by the Tribunal. A Consent Order is considered necessary in order to ensure the enforceability of particular undertakings respecting the merger.

I should emphasize that the decision to attempt to work out any kind of negotiated settlement is entirely at the option of the parties to a proposed merger or joint venture. In all cases they remain free to let a matter proceed to the Tribunal where they may contest the Director's application.

I should mention that there is also a separate exemption from the prenotification provisions of the Act for qualifying joint ventures. The prenotification provisions establish the framework for advance notification to the Director of Investigation and Research of certain large transactions that may raise issues under the merger provisions.

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Most R&D joint ventures would probably not meet the threshold requirements for prenotification, which include combined assets or sales of the parent firms of $400 million or more, and assets or sales of the business combination (in this case, the joint venture) of $35 million or more. In any event, section 84 of the Act provides an exemption from the prenotification provisions for joint ventures that is similar to, but somewhat broader than, the exemption for such provisions in section 67, which I described above. The exemption for joint ventures from the prenotification provisions requires that: (1) there be a written agreement between the parties that governs a continuing relationship and imposes an obligation on one or more of them to contribute assets to the venture; (2) no change in control of any of the parent firms results from the venture; and (3) the written agreement restricts the range of activities to be carried on by the combination and provides for its orderly termination.

III. The treatment of co-operative R&D agreements under the conspiracy provisions

Co-operative agreements relating to R&D, particularly those that go beyond mere collaboration on specific projects, may raise issues under section 32 of the Act. This is a criminal provision of the Act dealing with conspiracies in restraint of trade. Section 32 is the

oldest provision of Canadian combines legislation. While it initially dealt only with the restraint of competition in regard to articles and commodities, it was broadened in 1976 to cover services as well. The basic test applied under this section is whether an agreement lessens or is likely to lessen competition unduly.

The Act provides special treatment under the conspiracy provision for certain types of agreements that are likely to enhance efficiency. Subsection 32(2) specifies that, in a prosecution under the conspiracy provision, no person shall be convicted for participating in an agreement which relates only to co-operation in research and development or certain other activities such as the exchange of statistics or defining of product standards. It is important to note, however, that under subsection 32(3) this exception does <u>not</u> apply in circumstances where the agreement is likely to lessen competition unduly in respect of prices, quantity and quality of production, markets or customers or channels or methods of distribution. The exception also does not apply where the agreement is likely to restrict any person from entering into or expanding his other business in a trade, industry or profession. The net effect of these provisions is to clarify that co-operative agreements respecting R&D will be acceptable provided they do not have undue adverse effects on competition.

There have been no Canadian cases in which co-operative agreements respecting R&D have been shown to have such undue anti-competitive effects. There are, however, several cases that indicate in a more general way how activities that are ostensibly designed merely to facilitate efficient co-operation can form the basis of a conspiracy in violation of section 32.

In the Container Materials case, for example, a number of producers established a separate company, Container Materials Ltd., to act as their joint selling agent. The latter was also responsible, however, for enforcing uniform prices, output limitations and other restrictions on competition among its parent firms. As a result, Container Materials and the parent companies were convicted of engaging in a conspiracy to lessen competition unduly under section 498 of the Criminal Code, the predecessor to section 32 of the Competition Act.

Similar instances of joint activities that might have been considered acceptable in isolation but which, viewed in context, were part and parcel of conspiracies in restraint of trade, were dealt with in the General Electric and Armco cases.

The common element of these cases is that the restraints on competition among the firms went well beyond the arguably efficiency-enhancing co-operative activities such as joint selling or the definition of standards, to

encompass the sharing of markets and/or fixing of prices. In this regard, in the U.S. the courts have held that the use of a research project as a "sham" to implement a marketing sharing arrangement can be a *per se* violation of the antitrust laws.

IV. Related matters

In addition to joint ventures and co-operative R&D agreements, the Competition Act also contains special provision for the use of specialization agreements among competing firms. Specialization agreements are essentially agreements under which each of the parties agrees to discontinue production of a particular article or service. The purpose of such agreements is to facilitate rationalization of production within industries.

Where such agreements are found by the Competition Tribunal to be likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any lessening of competition, and where no attempt has been made to coerce any party to join such an agreement, they may be registered by the Tribunal pursuant to section 58 of the Act. Such registration may be made conditional on compliance with orders relating to the divestiture of assets, for instance, or the licensing of patents. Specialization agreements registered in this way receive an exemption from section 32 of the Act, dealing with conspiracies in restraint of trade, and from section 49 of the Act, insofar

as it relates to exclusive dealing. This is another way the Competition Act can accommodate activities that may involve some lessening of competition but that on balance are desirable for efficiency reasons.

In a similar vein, the Act provides for special treatment of export consortia under the conspiracy provision. Subsection 32(4) of the Act provides that, in a prosecution under the conspiracy provision, no person shall be convicted where an agreement relates only to the export of products from Canada. As in the case of co-operative R&D agreements, however, the exemption for export agreements is qualified. Subsection 32(5) of the Act provides that subsection 32(4) does not apply in circumstances where the agreement (1) is likely to limit the real value of Canadian exports of a product; (2) restricts any person from entering into or expanding the business of exporting products from Canada; or (3) prevents or lessens competition unduly in the supply of services facilitating the export of products from Canada.

One other issue relevant to your interests, but which would require another speech to treat properly, concerns the licensing of patents on new inventions. Patents may be exploited either directly by the patent holder or by other firms through the operation of licensing agreements. Occasionally, such agreements, particularly when they involve cross-licensing of technology among dominant firms, may give rise to issues under various provisions of the Competition

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Act, including the provisions relating to conspiracies, price maintenance, tied selling and exclusive dealing, and abuse of dominant position. In addition, section 29 of the Act provides special remedies to deal specifically with the use of patents or trade marks to restrain trade or commerce. This provision is invoked only infrequently -- the most recent use was in the Union Carbide cases of the early 1970s -- but it is still a consideration that should be kept in mind by business people like yourselves who are involved in the development and exploitation of new technology.

In conclusion, I have tried to describe a number of ways in which the Competition Act recognizes and accommodates the importance of R&D activities -- including, where appropriate, co-operative activities among firms that would otherwise be in competition with each other. These include the exemption from the merger provisions of the Act for qualifying joint ventures in section 67, the exemption from the pre-notification provisions in section 84, and the exception for certain co-operative R&D agreements from the conspiracy provision of the Act in subsection 32(2).

Obviously, the Competition Act goes to some lengths to provide special protection for co-operative R&D activities that are not likely to have significant anti-competitive effects. Even in cases that do not qualify for any of these exceptions, R&D joint ventures are not likely to be judged

anti-competitive under the merger provisions except in extreme cases. I should emphasize, however, that co-operation among competitors that goes beyond what is necessary to achieve beneficial efficiencies through R&D or similar activities can raise issues under several provisions of the Act.

I would like to remind you of the Director's standing invitation to business people to discuss with him any matters you believe may raise issues under the Act, under the auspices of his Program of Compliance. While I have tried today to provide you with an overview of the treatment of R&D activities under the Competition Act, I encourage you to take advantage of this program to further assist you in dealing with any particular concerns.

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Speech

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

S-10126

NOTES FOR REMARKS

BY

THE HONOURABLE HARVIE ANDRE, P.C., M.P.

MINISTER OF CONSUMER AND CORPORATE AFFAIRS CANADA

AND MINISTER RESPONSIBLE FOR CANADA POST CORPORATION

ON THE OCCASION OF

THE SECOND ANNIVERSARY OF THE COMPETITION ACT

HULL, JUNE 13, 1988

Canada

Check against delivery

As you may be aware this Sunday, June 19th, marks the second anniversary of the coming into force of the Competition Act. I have invited you here today to share my views on the effectiveness of the Act and the accomplishments under the new legislation.

To set the context for our discussion, I will spend a few moments highlighting the changes to Canada's competition laws and how those changes are compatible with other important economic initiatives undertaken by this government. I will then review the significance of these changes to the workings of the Bureau, with particular emphasis on merger review and on the new compliance approach undertaken by the Director of Investigation and Research in enforcing the provisions of the Competition Act. The Director, as you may know, is the head of the Bureau of Competition Policy. This latter discussion will give me an opportunity to share with you some of the more notable achievements under the new Act over the past two years.

The New Competition Act

Passing the Competition Act was a major accomplishment and one of which I think this government can rightly be proud. The reform of our competition laws was long overdue, the need for it being clearly identified in 1969 by the

Economic Council of Canada. Over the period since 1971, there were four failed attempts to amend the substantive provisions (merger, monopoly, conspiracy) of the Combines Investigation Act, although amendments on trade practices and the extension of the law's application to services were enacted in 1975.

It was not until this government made use of a broad consultative process that successful reform was achieved. Enactment of the Competition Act in 1986 gave Canadians modern, strong and effective competition legislation.

The Act's purpose, as is stated in section 1.1, is to maintain and encourage competition in Canada. Achieving that purpose will provide Canadians with an efficient and adaptable economy to expand our horizons in the international marketplace, while at the same time recognizing the role for foreign competition within our borders.

Equally, reliance on competition will ensure that firms of all sizes will be able to participate in the economy, and that consumers will have the benefits of competitive prices and product choices.

These objectives are now achievable with the new legislation. What are the improvements to the competition legislation that make this possible?

Most significant is the removal of merger and monopoly from the category of criminal offences. Under the old law,

harmful mergers could only be halted if the government could prove beyond a reasonable doubt that public detriment would result from the merger. Throughout the 75 years of the merger section's history, not a single contested conviction was achieved. The burden faced by the government was simply too great.

This government has amended merger law so that mergers are now non-criminal reviewable practices. If the Director of Investigation and Research is satisfied that a merger will likely prevent or lessen competition substantially in Canada, and there are no greater and offsetting efficiency gains, he can apply to the Competition Tribunal for an order that will stop, dissolve or restructure a merger. The less onerous standard of proof, the new merger provisions, and new provisions for consent remedies mean that the review of mergers can be carried out in an effective and responsible manner.

The criminal law proved equally inappropriate to the enforcement of the monopoly provisions of the Combines Investigation Act. The offence of monopoly has been replaced with a reviewable practice relating to the abuse of a dominant position. Recognizing the need to develop world-class corporations, the existence of high concentration or dominance of a particular market is not, in and of itself, a concern under the Act.

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What becomes objectionable, however, is when a dominant firm uses its market power in an abusive fashion to protect or extend its dominant position and thereby damages the competitive process. It is the conduct of a dominant firm that is the subject of examination under the Act.

Another important change to the law was the strengthening and clarification of the criminal conspiracy provisions. Recognizing the seriousness of this crime, Parliament has increased the maximum fine from $1 million to $10 million per conviction in addition to, or in lieu of, a maximum jail term of five years. Amendments were introduced to make clear the Crown's obligation to prove only that the parties intended to enter into an agreement that, if carried into effect, would unduly lessen competition. The Crown is not required to prove the parties intended to lessen competition unduly.

The competition law has been expanded and for the first time, the Competition Act provisions now have application to agent Crown corporations and banks.

The Competition Act and Economic Policy

The amendments to the competition laws were an integral part of the government's overall economic strategy and reflected a commitment to a greater reliance on private enterprise and the free market system in realizing Canada's

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economic potential. Regulatory reform has been undertaken in key sectors of the economy, most notably in the telecommunications, energy, transportation and financial markets. The privatization of several Crown corporations has proceeded and more are contemplated. Most significant, of course, is our initiative to achieve a liberalized trading relationship with the United States through the implementation of the Free Trade Agreement.

The goal of each of these initiatives is to reduce direct government control or influence in the economy and increase our reliance on the free play of market forces. The role of the Competition Act in this environment is to ensure that businesses engage in fair competition to ensure that the benefits of the more open marketplace accrue to the Canadian economy as a whole.

To the extent that government regulation of industry is reduced, the competition laws take on increased importance. Activities of firms in an industry that were previously subject to regulatory review will now become increasingly subject to the provisions of the Competition Act. I understand that the Director, through his advisory opinion service, has devoted a lot of effort to counselling these industries on the rules of conduct in a competitive marketplace.

The Competition Act is also fully compatible with the new economic environment created by the Free Trade Agreement. The Act recognizes the importance of international trade for our economy and is flexible enough to allow Canadian firms to restructure and rationalize their operations in order to meet the challenge of free trade. This is particularly the case in merger review, where efficiency gains giving rise to net trade benefits to Canada can prove to be of particular significance in assessing the effects of a merger. Additionally, by encouraging competition in Canada, the Act promotes the efficiency of Canadian firms which, in turn, helps them to respond to the opportunities that the Free Trade Agreement offers.

The free trade initiative equally does not reduce or remove the need for effective and enforceable competition laws. Should anti-competitive behaviour in bilateral trade go unchallenged, conceivably the gains we expect to flow from free trade could be jeopardized. Therefore, competition needs the protection of the law.

In fact, with the planned changes to Investment Canada's review thresholds, the Competition Act will assume even greater importance in the protection of competition in Canada. The Act applies a standard that does not differ because of the nationality of parties. This standard has already proven effective in addressing competition concerns

raised in relation to the U.S., as well as domestic acquisitions.

The Approach to Enforcing the Act

What have these changes meant for the Bureau of Competition Policy? Well, a higher profile in the economy; a lot more work; and a new and successful approach to enforcement.

To achieve timely and effective enforcement, the Director has adopted a compliance-oriented approach to administering the Act. This approach means that effective enforcement is accomplished as much by preventing violations of the Act, as by investigating and subsequently litigating violations that have occurred.

Prevention requires public awareness of the law and its administration. To this end, the Director and his senior management staff have undertaken numerous speaking engagements before trade and other business associations and professional groups. Additionally, the Director is committed to improving the flow of information to the public outlining Bureau policy, enforcement guidelines and interpretative comment on the provisions of the Act.

The compliance-oriented approach encourages the use of alternative resolution techniques such as consent and prohibition orders, undertakings and monitoring. These techniques have permitted the Director to limit the use of

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formal proceedings to the more serious and contentious cases. In turn, the need for costly and protracted court proceedings in certain cases is reduced. It also allows the Bureau to redirect resources to better prepare for cases where litigation is the only option. Use of alternative techniques has the added advantage that, upon settlement, the results and benefits are felt immediately. Timeliness is in the interests of those affected, whether they be competitors, producers or consumers.

The Director has also made it a priority to ensure that all decisions are fully informed ones. To facilitate this the Director has operated in an open and accessible manner. Informed decision-makhhing requires relevant input from industry and from external experts, so that matters can be thoroughly and realistically analyzed.

Accomplishments under the Act

So, what have I told you? We have a better competition law. The Director has developed what we believe to be a better approach to achieving compliance with that law. And the Director has been successful in our objective of maintaining and encouraging competition. Let's examine the track record to date.

Merger review under the new provisions has been effective in stopping anti-competitive mergers while at the

same time permitting the majority of merger proposals to proceed without issue. Between June 1986 and the end of May 1988, the Bureau has reviewed 222 transactions (i.e. those requiring two days or more of review). Of these, five have been restructured, five abandoned and two are currently before the Competition Tribunal.

The use of the alternative resolution techniques has proved extremely well-suited to the resolution of merger transactions that raised concerns for competition. Some mergers have been restructured prior to closing to meet the concerns of the Director. A recent example is the acquisition of certain assets of the InterBake Food Division of Weston Foods Ltd. by Nabisco Brands Ltd. The merger initially proposed was restructured so that a considerable portion of the baking assets were sold to another company -- Aliments Culinar Inc. -- thereby preserving the competitive health of the marketplace.

In other cases, where pre-closure restructuring has proven completely impractical, the Director has accepted undertakings for remedial action post-closing. An example here is the Canada Safeway/Woodward acquisition in which Canada Safeway undertook to divest itself of 12 grocery stores in order to meet the Director's objective that price and product competition be maintained in the local markets.

In yet other cases, the Director has adopted a monitoring approach. Where there may be competition concerns, but where the dynamics of the market may mitigate these concerns, the Director has acted responsibly and has not taken precipitous action. Two examples in the energy sector of mergers that have not been formally challenged by the Director, and yet will be subject to continued monitoring of the effects of the mergers, are the acquisition by Amoco Canada Petroleum Company Ltd. of Dome Petroleum Limited and the more recent acquisition by Nova of an interest in Polysar.

The Director has made application to challenge merger proposals before the Competition Tribunal only when he is certain that there are no further avenues open to resolve the competition issues. A recent example is the Director's challenge of the proposed partnership between the computer reservation systems of Air Canada and Canadian Airlines International.

The use of alternative resolution techniques has proved effective as well in the resolution of criminal law matters. In January 1988 consent orders of prohibition were issued by the Supreme Court of Ontario against the Law Associations of Kent County and Waterloo. The two associations were alleged to have been fixing the fees charged by their members for real estate transactions. The Law Society

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of Upper Canada lent support to the effectiveness of the orders by indicating to members that they ensure any pricing arrangements not contravene the Competition Act. Lawyers throughout the country, as well as other professional groups, have been put on notice of the potential impact of the Competition Act to the provision of their professional services.

Consent orders of prohibition were issued in March 1988 against 18 trucking companies, the Western Transportation Association and their respective directors, officers, agents or employees. The order specifically prohibits the practice of fixing or co-ordinating single line rates in the western markets. They are further prohibited from taking any discriminatory action against carriers for whatever rate the carrier adopts. The resolution of this case, a long-standing matter for the Bureau, was clearly a function of the Director's commitment to use the compliance-oriented approach to achieve efficient and effective results.

The media has carried stories recently concerning the inquiry into the fixing of commissions among real estate agents. The Director is looking into commissions paid by consumers to real estate agents for their homes which are, for most of us, the single most important consumer item we will ever buy. This matter is still under investigation.

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Of course, last week, guilty pleas and prohibition orders were entered against four companies in Saskatchewan and two of those same companies in Nova Scotia to charges of bid-rigging in the sale of business forms to government departments and agencies. The companies paid fines of $1.6 million in Saskatchewan and $400 000 in Nova Scotia. The Saskatchewan fine is by far the largest aggregate fine ever imposed in one case under the Competition Act or its predecessor. You should appreciate that consumers will benefit from this resolution in a more indirect way, as taxpayers, and through the protection of the integrity of government procurement procedures.

The Director is called upon from time to time to advance a pro-competitive position in government policy formulation or before the various federal and provincial regulatory tribunals.

The Director recently intervened in the Canadian Import Tribunal's inquiry into the matter of alleged injurious dumping of cars by Hyundai Motor Company of Korea. The Tribunal's ultimate finding of "no injury" to a large extent reflected the evidence and arguments advanced by counsel for the Director that Hyundai had provided consumers with competitive prices and product choices. Contrary to the allegations of injury, the Director argued that Hyundai had

in fact been a positive influence on competition, to the benefit of Canadian consumers.

You are no doubt aware of the deliberations of the House of Commons Finance Committee into bank services charges. The House Committee attempted to have the banks agree to a "Fair Personal Banking Practices Agreement" to redress some of the Committee's concerns. The Canadian Bankers Association maintained that the Competition Act prevented the Association from taking concerted action on two major portions of this proposal. While it is true that certain conduct by the Association regarding services and charges could violate the Act, there are many initiatives the Association could adopt that would benefit consumers. In April I sent a letter to the President of the Canadian Bankers Association identifying ways that consumers could be better served without contravening the Act. I also recommended that the Association seek the opinion of the Director under the program of Advisory Opinions, if the banks wanted to contemplate other common initiatives. There is, of course, nothing to prevent appropriate individual bank initiatives to better serve their depositors.

This record of success built up over the first two years convinces me that we have a strong piece of legislation that is being enforced in a way that is both realistic and effective. The interests of maintaining and encouraging

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competition in Canadian markets is now being protected with consequent and immediate benefits to both business and consumers.

Canada's new Competition Act reflects the commitment on the part of this government to a greater reliance on private enterprise, the free market system and international trade in the realization of Canada's economic potential.

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Speech

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

S-10128

THE RECENT REFORM OF COMPETITION LAW IN CANADA

NOTES FOR AN ADDRESS

TO THE

EINAUDI FOUNDATION CONFERENCE

ON COMPETITION POLICY IN OECD COUNTRIES

BY

CALVIN S. GOLDMAN, Q.C.

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BUREAU OF COMPETITION POLICY

CONSUMER AND CORPORATE AFFAIRS CANADA

NAPLES, ITALY, JUNE 16, 1988

Canada

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Introduction

I am pleased to have the opportunity to share with you today some of the Canadian experience in the field of competition law and reform. I have provided a package of materials to Professor Da Empoli on the Canadian Competition Act, together with some recent speeches and news releases which may be of interest in understanding the provisions of the Act and also how it is being applied.

Canada's first competition legislation was passed nearly a century ago in 1889, one year before the United States passed the Sherman Act. Over time, our legislation has evolved and matured along with the Canadian economy. The most significant stage in this development was the enactment of the Competition Act in 1986. This Act represents a move away from a strictly criminal law approach to a blend of criminal and non-criminal provisions. Earlier, legislation was based primarily on the federal government's constitutional authority to enact criminal law, but recent cases support a broader concurrent constitutional authority under the federal government's trade and commerce power which is a non-criminal constitutional power.

The Process of Reform

I would like to describe the events that led to this new legislation. In 1966, the Government of the day asked

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the Economic Council of Canada, a Canadian federal government agency, to produce a report on competition policy. Three years later, in 1969, the Council issued its report which identified the need for substantial reforms. Among its recommendations were the shifting of merger and monopoly provisions from criminal to non-criminal law and the creation of a specialized tribunal to adjudicate non-criminal matters. Criminal law procedural requirements and the strict burden of proof on the Government made the previous legislation too difficult to enforce. Also, the criminal law was too confining in effecting remedies to anti-competitive situations.

In 1971, a bill was introduced in the House of Commons which incorporated many of this report's recommendations. However, extensive public criticism as to the scope and nature of the Bill's proposals resulted in the splitting of the changes into two stages. Accordingly, a package of relatively non-controversial amendments was passed in 1975 while the more contentious proposals were examined further.

Over the next 10 years, the debate continued as a number of efforts to reform the Act were unsuccessful. Finally, after much consultation with interested groups, the Competition Act was passed in June 1986. Extensive discussions with representatives of the business community and the economic and legal professions were instrumental in the successful passage of the Act.

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Clearly, the process of reform in Canada was a long and arduous one. However, the extensive consultation and study which took place were valuable in enabling the new Act to be fully cognizant of the concerns of all interested parties and the needs of the contemporary Canadian economy. The result, I believe, is a more effective statute.

Key Principle Underlying the Competition Act

Before discussing the objectives and provisions of the Competition Act, I would like to discuss the key principle which underlies it. This principle can be summarized as follows: A sound Canadian competition policy must take into account the unique features of the Canadian economy.

These special features include, most notably, the relatively small size and openness of the Canadian economy especially compared to the United States. The small and geographically segmented nature of most Canadian markets often leads to high levels of market concentration. However, despite their large size relative to the domestic market, many Canadian companies are still too small to achieve an efficient scale of production.

This combination of the small size of Canadian markets together with our openness to trade with other countries makes Canada's prosperity dependent, to a large extent, on the ability of Canadian industry to be competitive in international markets. The focus on international competition

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and international markets is apparent in a number of places throughout our new Act.

Objectives of the Competition Act

The importance of this underlying principle is evident when one examines the purpose clause of the Competition Act which provides a general framework for the entire legislation. It specifies four main objectives, as follows:

- "to promote the efficiency and adaptability of the Canadian economy",
- "to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada",
- "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy", and
- "to provide consumers with competitive prices and product choices".

The first two goals relate directly to the smallness and openness of the Canadian economy which I just discussed. While the latter two objectives do not flow directly from any such characteristics, they are just as important in Canada as in other countries.

Institutional Setting

I would like to turn now to the matter of describing in a summary format how we seek to achieve these goals through

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enforcement of the Competition Act. In order to do so, I would like first to discuss the institutional setting and then proceed to describe the substantive provisions of the Act.

As Director of Investigation and Research, I have responsibility for enforcement of the Act. The Director is the head of the Bureau of Competition Policy which provides him with staff support. There are two different forums to which the Director brings forward cases for adjudication. In most non-criminal matters, adjudication is conducted by the Competition Tribunal. This adjudicative body, which was legislated into existence at the same time as the Competition Act in 1986, is composed of four judges and up to eight non-judicial members. This blend of judicial and non-judicial members is aimed at ensuring due process and impartiality while at the same time having adjudicators who are very familiar with the applicable disciplines such as commerce and economics. On the other hand, in criminal cases, judicial review is conducted by the criminal courts, not the Competition Tribunal.

There are three different ways in which inquiries can be opened under the Act. Most frequently the Director commences them on his own initiative, usually following a complaint by a customer or competitor. However, inquiries are also conducted as a result of the Director receiving an application for an inquiry from six residents of Canada in

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the form of a statutory declaration. The third way is as a result of a direction from the Minister of Consumer and Corporate Affairs to commence an inquiry.

The Director has extensive investigatory powers and discretion as to the proper procedures to apply. The statutory authorities are vested in the Director who is appointed by the Prime Minister and the Cabinet through an Order-in-Council. One of the tools available is the making of an application to a court for a warrant authorizing the search of premises and the seizure of evidence pertaining to an inquiry. The Director may also apply to a court for an order requiring any person having or likely to have information relevant to an inquiry to produce records, make written returns or be examined orally. Inquiries may be discontinued at any stage at the discretion of the Director.

As I noted earlier, the Director may bring non-criminal cases forward directly to the Competition Tribunal for adjudication. However, for criminal cases, the Director submits the case to the Attorney General who then may bring the cases before the criminal courts.

I should note that the scope for private action is limited in Canada. Private parties may seek recovery of damages suffered as a result of an alleged violation of the criminal provisions of the Act. There is no scope for private action with respect to non-criminal matters. Furthermore, only single damages can be recovered, not

treble damages as, for example, in the United States. The use of private action in Canada has also been limited by uncertainty as to the constitutionality of the relevant provisions of the Competition Act. Two cases currently before the Supreme Court should ultimately help to resolve some of this uncertainty.

The Act also confers considerable discretion on the Director. The Director must commence an inquiry if he has reason to believe there has been or is likely to be a contravention of the criminal provisions or that grounds exist for the making of an order by the Tribunal under the non-criminal provisions. However, there are no specific requirements that the Director refer the case to the Attorney General or that he apply to the Competition Tribunal if grounds exist to justify the discontinuance of the inquiry. This discretion allows the Director to make use of different types of negotiated settlements to obtain compliance with the statute. We have done this using, in appropriate cases, undertakings, and we have broadened the use of consent orders. In other words, we try to obtain early and effective corrective conduct without the time delays, costs and uncertainty associated with full scale litigation.

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Main Provisions of the Competition Act

I would now like to describe the main substantive provisions of the Competition Act.

The first topic I would like to discuss in this context is mergers. I think it is fair to say that the new law dealing with mergers is the most important and far-reaching reform brought about by the passage of the Competition Act. The old law contained criminal sanctions that proved to be totally ineffective. Indeed, in the 75-year history of the previous merger law, only nine cases were brought to court, not one of which was successfully prosecuted on a contested basis by the Crown. Seven cases resulted in acquittal, while in two cases, guilty pleas were entered by the parties.

The new merger law has been changed to a non-criminal law setting. This change was necessary to allow for the consideration of a wide variety of economic factors and their effects, whether actual or potential, and to relieve the Crown of the exceptionally difficult criminal law burden of proof when looking at the possible future effects of a merger.

In order for a merger to be prohibited, it must give rise to a prevention or lessening or the likelihood of a prevention or lessening of competition substantially. This test takes into account a broad range of factors such as foreign competition, barriers to entry, availability of substitutes, extent of change and innovation and the

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effective competition remaining after the merger. It should be noted that the Act specifically states that a finding that a merger substantially lessens competition should not be made solely on the basis of evidence of market share or concentration. This provision is designed to ensure that the Tribunal's decision-making process is not merely mechanistic and that it considers both the qualitative and quantitative aspects of competition. The new merger law gives my office three years from substantial completion of the merger in which to challenge it. It also allows me to issue a statutory advance ruling certificate which gives the parties to the merger certainty of protection from any challenge.

The merger provisions also provide for an exception in situations where the gains in efficiency that would result from the merger would more than offset the costs due to lessening of competition. This feature of the Act reflects the importance of considering the cost savings that are sometimes brought about by mergers through scale or other economies. No such provision existed under Canada's old competition law. In fact, the Act specifically states that if there are net trade benefits likely to flow from these efficiency gains, then that is a particularly important consideration.

The Director may make an application to the Tribunal to block a merger either before or within three years after a merger is substantially completed. If the Tribunal finds

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that a merger lessens or is likely to lessen competition substantially, it has a wide range of tools at its disposal. In the case of a completed merger, it can order dissolution of the merger or the divestiture of certain assets. In the case of a proposed merger, the Tribunal may order the parties not to proceed with all or part of the merger or may prohibit certain conduct if all or part of the merger proceeds.

The Director can apply to the Tribunal to issue an interim order to block a proposed merger if it is deemed by the Tribunal to be reasonably likely to lessen competition substantially or if parties failed to give prior notification as required for large mergers. As well, if the Tribunal receives an application for an order and the Director and the parties involved agree on the terms of the order, the Tribunal can issue the order on consent without hearing the usual evidence.

As I will discuss later, only a small percentage of merger cases involve applications to the Tribunal. From our experience, the majority of business people do not want to have their future plans reviewed in a public courtroom through adversarial proceedings. Unless one wants to use that procedure to block all challengeable mergers, one needs a wider and more flexible range of remedies that allow for resolution of merger problems other than by fully contested litigation. There are a number of ways in which merger

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cases are resolved in the absence of such an application. One of these is through the issuance of an advance ruling certificate (ARC). An ARC is issued following a request of the parties to the transaction when the Director is satisfied that there are not sufficient grounds to make an application to the Tribunal. Because the issuance of an ARC is binding on the Director, the statute provides that the issuance of an ARC is at the discretion of the Director. For instance, if a merger proposal raises no immediate competition concern, but it is thought that a substantial lessening of competition may possibly arise from the merger within three years after the merger, the Director may give a non-binding advisory opinion rather than issuing an ARC. The opinion may indicate an intention to monitor the market. Monitoring allows us to see if market forces keep conduct from creating a real deterrent to competition and reflects our policy of not interfering unless it becomes necessary.

The Director may consider undertakings as a way to secure compliance with the Act, without the need for proceedings before the Tribunal, in situations where substantial concerns are identified regarding a proposed acquisition. Most undertakings of this nature involve some form of restructuring of the transaction. These undertakings are backed by provisions calling for consent orders if a breach of the undertakings occurs. Yet another approach is to advocate a 'fix it first' philosophy so that

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there is no need to enter into undertakings. This is our preferred course of action as it involves restructuring the transaction with certainty before the closing date for the merger. Finally, applications for consent orders can be made in cases where such is warranted.

The Act also includes a provision which requires pre-notification to the Director of certain mergers. In particular, mergers in which the combined sales or assets exceed $400 million (Canadian) and the value of the acquisition target itself exceeds $35 million (Canadian) in assets or sales are subject to this requirement. The waiting periods under these provisions are very short, ranging from seven to 21 days. If there is no challenge, parties may close the transaction. Without an ARC, the Director can still challenge a merger, in whole or in part, within the subsequent three-year period. I should note that the merger review law applies to all types of mergers regardless of size and regardless of any obligation to notify my office.

Another noteworthy feature of the Competition Act is its non-criminal abuse of dominance provision. It replaces the criminal offence of monopoly in the old legislation. The substantive test of the abuse of dominance provision is the following. Is a dominant firm or firms engaging in a practice of anticompetitive acts that is having, or is likely to have, the effect of preventing or lessening competition substantially in the relevant market?

Accordingly, it is clear that it is the conduct, not size alone, of a dominant firm that is important. Such conduct becomes the subject of examination when the firm uses its market power to protect or extend its dominant position.

The Tribunal has much latitude in choosing remedial orders. It is able not only to order the firm or firms to stop the practice of anticompetitive acts but also to order the taking of other steps, such as divestiture, if they are necessary to overcome the effects of the practice in the market.

The Act includes a number of other non-criminal provisions. These cover practices such as refusal to deal, exclusive dealing, tied selling and delivered pricing. There is also a section that allows for registration with the Tribunal of specialization agreements which provide an exemption from certain sections of the Act.

Turning now to the criminal provisions of the Competition Act, I would like first to discuss those relating to conspiracy in restraint of trade, the equivalent of section 1 of the Sherman Act or Article 85 of the Treaty of Rome in relation to cartels. The Competition Act provides for a fine of up to $10 million (Canadian) and/or a five-year jail term for entering into a criminal conspiracy. This compares with the $1 million (Canadian) maximum which existed under the old Act. It is noteworthy that the existence of a conspiracy can be established on the basis of

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circumstantial evidence alone without direct evidence of communication between the parties involved. However, there exist limited exemptions for export consortia.

Other practices covered by criminal provisions include bid rigging, price discrimination, predatory pricing and deceptive marketing practices. Misleading advertising is also one of the main categories of offences covered by the Competition Act for which my office is responsible.

The Act also provides for the Director to make representations respecting competition to federal and provincial regulatory boards and commissions. This can be an important role for the Director given the substantial impact that the decisions of such regulatory bodies can have on competition in fields like transportation, telecommunications and international trade.

Recently, by way of example, my office intervened before the Canadian Import Tribunal in its examination of whether Hyundai was dumping cars in Canada and causing material injury to Canadian producers. We argued Hyundai was not causing such injury, and the Tribunal so found in its reasons notwithstanding arguments to the contrary by Ford and General Motors.

As a final comment in outlining the provisions of the Act, I should note one feature which is not present anywhere in the Act: a "public interest" test like the one used in, for example, the United Kingdom. There is no basis for the

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Director to consider other economic and social goals such as employment creation.

Enforcement Approach

As all of you are aware, the enforcement approach chosen can be very important in determining the overall impact of competition legislation. In Canada, we have adopted a compliance-oriented approach as the one most conducive to achieving the goals of timely and effective enforcement of both the criminal and non-criminal provisions of the Act. I firmly believe that effective enforcement of the legislation is to be accomplished as much by preventing violations of the Act as by discovering and initiating legal proceedings after a violation has occurred. In this regard, we have a policy of proactive compliance involving speeches, advisory opinions, Information Bulletins and meetings with business people, all with the objective of increasing general awareness of the provisions of the Act. In terms of enforcement of the Act in particular cases, compliance alternatives include information visits, undertakings, monitoring and consent orders rather than always initiating the litigation process.

Under our compliance approach, we offer a broad spectrum of alternatives to ensure that every reasonable opportunity is provided to business persons to structure their affairs within the limits of the law. This allows us

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to narrow the use of formal contested proceedings to the more serious and contentious cases thereby reducing the need for costly and protracted court proceedings in certain types of cases. When formal proceedings have proven necessary, however, I have not shied away from choosing to use them. I believe that this willingness is essential for our compliance-oriented approach to be successful. However, when using other less litigious forms of case resolution, I appreciate the need to put as much information as possible on the public record for reasons of accountability and to facilitate future compliance. To the extent we can, we do this through news releases, speeches and the Director's Annual Report. This means that we must always be balancing the need for confidentiality against that for disclosure.

Recent Achievements

On the whole, I am quite pleased with our record of achievement in enforcing the Competition Act. From my perspective, the business community also appears to be generally satisfied, especially with our open door, compliance-oriented approach, as are other members of government and the media who have not raised concerns of significance.

With respect to mergers, as of June 9, 1988, some two years since the Competition Act came into force, the Bureau has examined 223 transactions; (that figure includes only

those requiring more than two days of review). Of these, five have been restructured (either before closing or through undertakings to do so), and another five have been abandoned for reasons in whole or part related to the position I have taken. Two merger matters are currently before the Tribunal, and 32 examinations are ongoing within my office. Additionally, I have issued 37 Advance Ruling Certificates, provided 29 Advisory Opinions of which 16 have involved monitoring. The majority of mergers then have proceeded either unhindered or with relatively minor alterations. On July 15, 1987, the requirement to pre-notify certain merger proposals came into force, and since then there have been 81 pre-notification filings.

Before commenting on a few merger cases, I would like first to comment briefly on the merits of having a new merger law. Prior to the passage of the Competition Act, there was no effective check on mergers. With its passage we are reviewing, on average, about 10 percent of all mergers. Of these reviewed, the vast majority proceeded without undue delay or interference. A small number, approximately 10, needed, in our view, to be revised or stopped. Therefore, the new merger law allows virtually the same economic growth as before and permits business to move ahead while at the same time ensuring consumers are protected as are competitors, suppliers and customers. As long as we have a flexible, balanced and expeditious assess-

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ment process, and as long as decisions are made on a properly informed basis, the new merger law will work well for Canada.

I would like to discuss briefly a few merger cases which I believe illustrate certain features of the Act and the approach that we have taken.

Early in 1987, the New Zealand conglomerate, Fletcher Challenge, proposed to acquire a controlling interest in B.C. Forest Products Limited. We ultimately decided that this transaction was not likely to lessen competition substantially. That conclusion was based in large part on the existence of alternate foreign sources of supply as well as on potential efficiency gains to the business in Canada. We are however still monitoring the situation to determine the actual effects of the transaction. This position reflects our policy of not interfering in business decision-making unless it appears necessary, relying instead on monitoring the market effects.

Later in 1987, we decided not to oppose the $5 billion (Canadian) acquisition by Amoco Canada of Dome Petroleum. Once again, our concerns about this merger were tempered by the impact of international market forces on competition in the Canadian market for certain Canadian gas liquids such as propane. Again, we will continue to monitor the situation over a three-year period to see whether any specific problems for competition arise in the market.

The Canada Safeway/Woodward stores acquisition was another merger that initially raised concerns under the Act. This merger involved the acquisition of retail grocery operations in 17 urban markets in Alberta and British Columbia. It was allowed to proceed unchallenged after undertakings were given by Canada Safeway, one of which requires divestiture of 12 stores in six geographic markets. Again, the situation will be monitored to ensure that there are no troublesome developments in the market within the three-year period.

More recently, we looked at a proposed acquisition in the Canadian cookie and cracker market involving Nabisco and George Weston. After careful examination, we decided that the transaction would substantially lessen competition in this market. As a result, the parties went back to the drawing board and came up with a new proposal. Under this proposal, the original acquirer would purchase mainly those assets associated with export sales while another buyer would purchase the remaining assets. This alleviated our concerns, and we informed the parties that we would not challenge the restructured proposal.

A final example of our approach to mergers involves the Nestlé/Nabisco transaction. Initially Nestlé intended to acquire all three coffee supply divisions of Nabisco. Our examination concluded that this could result in a substantial lessening of competition in Western Canada. As a

result of my position, Nestlé restructured its transaction and sought another buyer for Nabisco's two coffee supply divisions in Western Canada. Subsequently, General Foods agreed to purchase these two divisions, and the final transaction did not give rise to a substantial lessening of competition in Western Canada. I am continuing to monitor the industry over the three year period to ensure that a material change in circumstances does not alter this conclusion.

Finally, I should mention a criminal case that was resolved just last week. Four companies were fined a total of $1.6 million (Canadian) after pleading guilty to charges of bid-rigging on tenders for government business forms, and two of the same companies pleaded guilty to the same charges in another market the day before and were fined $400,000. A comprehensive order of prohibition was also imposed by the Court. The fine of $1.6 million is the largest ever imposed under any section of either the Competition Act or its predecessor, and certainly $2 million in two days is rather a unique sum by Canadian standards.

Finally, a few additional comments about our overall approach. In relation to our merger review process, we have strived to open doors to early discussions, taken steps to enhance security and confidentiality of information and moved towards conducting our assessments as quickly as possible. However, our assessments are also carried out

very carefully as the Director is the only person who can challenge a merger or restructure it without going before the Tribunal. Moreover, only the Director can issue advance ruling certificates.

With each assessment, we consult extensively with outside economists and industry experts. This is done to make sure our decisions are properly informed ones. In my view, the results so far show that most decisions have been within a range of reasonableness, and few have resulted in contested litigation.

Concluding Remarks

In conclusion, many of the features of the Competition Act will grow more important over time particularly given progress towards trade liberalization in North America, and possibly as well in the current round of multilateral trade negotiations. There is already increasing interest in Canada among the business community, the media and others as to the manner in which the Act, and particularly the merger review process, will unfold as businesses in Canada continue to grow and rationalize production in face of the liberalized trade challenge. I believe that the Act allows us great flexibility to encourage such efficiencies while still protecting the competitive state and health of the Canadian marketplace.

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Speech

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

CANADIAN ANTITRUST ENFORCEMENT

NOTES FOR AN ADDRESS

TO THE

CRIMINAL PRACTICE AND PROCEDURE COMMITTEE

AMERICAN BAR ASSOCIATION - SECTION OF ANTITRUST LAW

BY

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BUREAU OF COMPETITION POLICY

CONSUMER AND CORPORATE AFFAIRS CANADA

TORONTO, AUGUST 8, 1988

Canada

Introduction

I am pleased to have been afforded this opportunity to provide you with a basic appreciation of Canadian antitrust laws and the manner in which we enforce them.

I thought I would begin by providing a history of Canadian competition law and an overview of the Competition Act. I then intend to highlight some of the differences between Canadian and American antitrust statutes, outline the investigatory tools we employ in our inquiries under the Act and, finally, describe the various components of our enforcement strategy with specific application to the prosecution of bid-rigging and conspiracy offences.

You may wish to explore subjects which I do not cover but are of interest to you or your clients during the question period alloted for this committee meeting.

The History of Canadian Competition Law

Canada's antitrust laws are contained in the Competition Act[1], which became law in June 1986. The Director of Investigation and Research is the statutory authority responsible for the administration and enforcement of the Act. The Director's staff is known collectively as the Bureau of Competition Policy.

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Many observers, Canadian and American alike, are surprised to learn that Canada's original antitrust statute was enacted in 1889, one year before the U.S. Sherman Act.[2] The Act, entitled An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade,[3] related only to conspiracies, agreements and combinations. The term "anti-combines," which is used as frequently in Canada as the expression "antitrust," arises from the original title and from the successor pieces of legislation which, until the Competition Act, were known as the Combines Investigation Act.

The original legislation was subsequently amended to cover mergers and monopolies in 1910,[4] price discrimination and predatory pricing in 1935,[5] resale price maintenance in 1951[6] and misleading advertising and disproportionate promotional allowances in 1960.[7]

The Canadian government's attempts to enact major revisions to the Combines Investigation Act began in 1966. The first draft legislation,[8] which appeared in 1971, met with such strong opposition from the Canadian business community that the government of the day made a decision to revise the Act in two distinct stages.

The first stage of the amendments came into effect in 1976.[9] The 1976 amendments added bid-rigging, civil damages, reviewable trade practices and deceptive marketing provisions to the coverage of the Act. They also substan-

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tially revised the price maintenance and misleading advertising provisions. In addition, the amendments allowed for representations to federal regulatory bodies by the Director of Investigation and Research and, in perhaps the most significant change, extended the application of the Act to services.

The second stage of the amendments culminated on June 19, 1986, when the Competition Act received Royal Assent. This legislation decriminalized mergers and monopolies and created a Competition Tribunal to deal with mergers and monopolies (now labelled abuse of dominant position) and other reviewable trade practices. The Act added delivered pricing and specialization agreements to the variety of practices that may be brought before the Tribunal by the Director. The legislation also placed banks and Crown corporations under the Act. In addition, the investigatory powers of the Director of Investigation and Research were revised to conform to Canada's Charter of Rights and Freedoms.[10]

The activities covered by the Competition Act can be placed in the following categories:

1) mergers
2) reviewable trade practices
3) agreements to restrict competition
4) pricing practices and

5) misleading advertising and deceptive marketing practices

The provisions relating to the first two categories, mergers and reviewable trade practices, are non-criminal and are found in Part VII of the Act. The reviewable practices subject to the Act include abuse of dominant position, tied selling, market restriction, refusal to deal and exclusive dealing.

The remaining three categories of activities fall within the criminal provisions in Part V of the Act. Agreements to restrict competition include conspiracy, bid-rigging and certain agreements among banks. Pricing practices relate to price maintenance, predatory pricing and price discrimination. The final category of criminal offences includes false and misleading advertising, pyramid selling, bait and switch selling, sales above advertised prices and misleading representations regarding performance claims and warranties.

Differences between Canadian and American Law

I do not intend to outline all of the differences between Canadian and American antitrust laws. I will, however, highlight the differences which I think may be of interest to you and your clients.

Perhaps the most fundamental difference is the fact that the conspiracy provision of the Competition Act does

not create a _per se_ offence. Rather, the provision requires the Crown to prove that the impugned agreement, if carried into effect, would lessen or limit competition "unduly." On the other hand, bid-rigging is a _per se_ offence in Canada, although persons rigging bids may escape conviction if they advise the tender letting authority of their arrangement with other bidders. This exception, often referred to as the "made known defence" was introduced into the law to facilitate joint ventures; but, as you can appreciate, it may have a wider application.

Another significant difference relates to price discrimination. Differing prices in Canada are only allowed on the basis of quantity or quality of products. Therefore, discounts cannot or need not be cost justified, nor are functional discounts permitted. To commit an offence, the supplier must engage in a _practice_ of discriminating among purchasers in competition with one another.

Another difference between our laws is that Canada has not retained a criminal monopoly provision in addition to our section dealing with abuse of dominant position, a matter which is reviewable by the Competition Tribunal.

Price maintenance activity is more frequently prosecuted in Canada than in the United States, especially if it is engaged in by firms with some degree of market power or it is widespread in the market with respect to the product in question. The debate in the U.S. over whether vertical

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price restraints should be a per se offence or be subjected to a rule of reason approach has less relevance to Canada because the Competition Act provides statutory defences for some instances of refusals of supply based on the purchaser's discount policy. A defence is available if the purchaser has made a practice of loss-leading, bait and switch selling, misleading advertising or not providing an adequate level of servicing. This latter defence addresses the argument of some economists that price cutters often "free ride" on other retailers' servicing.

Damages arising out of criminal violations of the Competition Act are recoverable but are not trebled as in the U.S. However, the legitimacy of treble damages, as you know, is currently under review in your jurisdiction. The constitutionality of our civil damages provision will be decided by the Supreme Court of Canada in a forthcoming judgment.[11]

A final noteworthy distinction relates to investigatory powers, a subject I intend to address next.

Investigatory Powers under the Competition Act

In the United States the Department of Justice - Antitrust Division (DOJ) primarily utilizes grand jury investigations to acquire evidence of criminal activity. The use of search warrants is a far less common occurrence.

In Canada the Bureau of Competition Policy relies heavily on the use of search warrants, which may be granted

by a judge pursuant to section 13 of the Competition Act. An application for a warrant is made ex parte by an authorized representative of the Director based on information under oath or affirmation that reveals reasonable grounds to believe that an offence has been or is about to be committed or, that grounds exist for the making of an order by the Competition Tribunal, in the case of non-criminal reviewable matters.

I think it is fair to say that in over 90 percent of inquiries involving price-fixing or bid-rigging, search warrants are used to gather evidence. The figure would be somewhat lower for other criminal offences.

Other statutory investigatory powers are found in section 9 of the Act. The Director may apply for an order for oral examinations, production of records or the making of a written return under oath or affirmation. Written returns can be used to obtain statistical information such as production or sales figures or market share data. As with search warrants, the applications are made ex parte to a judge by way of information under oath or affirmation. However, there is an interesting difference in the provisions for section 13 search warrants and section 9 orders. On an application for a search warrant, the Director must satisfy the judge that there is reason to believe that an offence has been or is about to be committed. To obtain a

section 9 order, he need only show that an inquiry is being made and that the information sought is relevant to the inquiry.

The provisions conferring all of the powers discussed above were revised with the passage of the Competition Act to conform to our Charter of Rights and Freedoms. After the Charter came into force in April 1982, the search and seizure provisions under the Combines Investigation Act and the power of the Restrictive Trade Practices Commission (RTPC) to order oral examinations and the production of documents came under challenge. The search power was ultimately declared unconstitutional by the Supreme Court of Canada in the September 1984 decision in Southam.[12] The powers of the RTPC were the subject of conflicting decisions in different jurisdictions.

It is likely that the current investigatory powers do not offend the Charter, as they were designed in light of the safeguards enunciated by the Supreme Court in its Southam decision.

At any stage of an inquiry involving the criminal provisions of the Act, the Director of Investigation and Research may take one of two possible actions: discontinue the inquiry pursuant to section 20 of the Act, or refer it to the Attorney General of Canada under section 21 of the Act for such action as the Attorney General may wish to take. The Department of Justice is therefore responsible for the conduct of all criminal prosecutions under the

Competition Act. However, for non-criminal matters it is the Director who decides whether to make an application to the Competition Tribunal for a remedial order.

Inquiries referred to the Department of Justice are handled in one of three ways. They may be closed if, in Justice's opinion, the matter does not warrant prosecution; they may be the subject of prosecution; or they may lead to an application by the Attorney General to a court for an Order of Prohibition. I shall have more to say about Orders of Prohibition a little later in my address.

Initiatives to Seek Compliance with the Act

The Director of Investigation and Research and his staff are committed to a compliance-oriented approach as the means to achieve conformity with the Act in the most efficient and economical manner.

This approach is designed to prevent violations of the Act and, consequently, to reduce the need to discover violations and to initiate legal proceedings after a contravention has occurred. Through education, information and consultation we expect to narrow the requirement for formal proceedings to the most serious and contentious cases.

However, we have been advising our Canadian audiences that our efforts at compliance should not be taken as an indication that we will be less than vigorous when a matter requires inquiry and litigation. In this regard, we have

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sensed the growing level of disdain in Canada for price-fixing activities and have noted the efforts in the U.S. to combat such activity with vigorous enforcement and stiff penalties.

As in other industrialized nations, enforcing the criminal provisions against conspiracy and bid-rigging is the cornerstone of Canada's competition laws.

With the passage of the Competition Act in 1986, the Canadian Parliament raised the maximum fine in conspiracy cases tenfold. Adopting a maximum fine of $10 million was a clear signal to the business community that Parliament views conspiracy as a serious economic crime. The maximum fine is in addition to the possibility of a jail term of up to 5 years.

In a recent judgment involving bid-rigging on glazed glass for the construction of buildings in British Columbia, Mr. Justice Lander said:

> I might say at this particular juncture of my reasons that there can be no doubt that what the defendant corporations did through their respective employees is reprehensible. A cover bid or quotation accepted by a contractor is harmful in that it is, in my view, a fraud and unnecessarily and dishonestly increases the cost to an owner/builder.[13]

Perhaps you have read the Wall Street Journal account of our most recent bid-rigging prosecution, which involved the supply of business forms in the Province of Saskatchewan.[14] While levying a record fine of $1.6 million (Canadian) against four firms, the judge noted that the bid-rigging activity directly affected the pocketbooks of all citizens of the province. In a similar case in Nova Scotia involving two of the same firms, the judge noted that "it is the taxpayer who suffers from practices such as these and punishment must be severe."[15]

Few doubt the magnitude of harm that derives from this type of commercial theft and fraud. While some commentators have argued that cartel activity is ultimately doomed to failure, this theory ignores the fact that conspiratorial and bid-rigging activity may go unchecked for a number of years and over that time period, consumers, businesses and governments may suffer losses amounting to many millions of dollars.

With lawmakers and the judiciary taking aim at these offences, we see a role for the Bureau of Competition Policy in ensuring that the business community takes note of the changing attitude toward this crime.

Like our U.S. counterparts, we continue to uncover on an all-too-frequent basis, instances of conspiracy, market sharing and bid-rigging. Recent and current court proceedings have involved hotels, lawyers, slaughter hogs,

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funeral services, pharmacists, trucking, motorcycles, school bus services, soft drinks and driving lessons. Some of these cases are very localized while others are more national in scope. The one constant is the constant supply of these cases. Clearly the message has not been received. This, I suspect, was possibly due to a lack of adequate communication and, in some instances, to a belief that such crimes go largely undetected and unpunished.

The first cause can be corrected by undertaking compliance-oriented initiatives such as education, while the second can only be counteracted by vigorous enforcement and meaningful penalties. Through our compliance initiatives, which I touched on earlier, we hope to educate the business community through speeches, advisory opinions, annual reports and information bulletins.

The second area becomes very important if the first method of attack is unsuccessful. The Director of Investigation and Research currently has some 30 inquiries and prosecutions involving conspiracy or bid-rigging or both. This, of course, does not include matters at the preliminary examination stage. Using the customary 10:1 ratio for Canadian and U.S. comparisons, this would translate into approximately 300 cases with the Department of Justice. From these figures, you can see that the Director and his Deputy Directors have made it a clear priority to focus significant resources on the detection and pursuit of these offences.

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We in the Bureau of Competition Policy read with interest the remarks of people like Charles Rule and Judy Whalley regarding the very tough approach the Department of Justice is taking to what is termed "cartel behaviour" or "naked anticompetitive restraints." Like our U.S. counterparts we have adopted a flexible and sensible approach to merger analysis. However, the Director's flexible and open door approach to mergers does not portend a less than vigorous enforcement of the laws against covert, anti-competitive conduct. The recent Business Forms prosecution, to which I referred earlier, illustrates our willingness to seek significant fines for convicted corporations.

With regard to individuals, we have on occasion recommended to the Attorney General of Canada that individuals be charged for their involvement in price-fixing or bid-rigging. In order to increase general deterrence, which after all is the ultimate goal of prosecution, we are considering recommending to the Attorney General's office that more individuals be subject to prosecution in situations of clear criminal conduct and that appropriate periods of incarceration be sought from the courts in successful prosecutions. The Competition Act already allows for imprisonment of individuals for up to five years for both conspiracy and bid-rigging offences.

Your approach in relation to prosecuting and jailing individuals seems to be slowly having an impact in U.S.

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cases and U.S. antitrust enforcement officials constantly warn the business community of its policy of charging individuals and seeking substantial prison sentences. In a recent address on stiffer antitrust penalties, Charles Rule noted that in the last 10 years the average jail sentence for individuals convicted of antitrust violations has risen 30 percent and that in the last year individuals have received terms of imprisonment of at least six months on seven separate occasions.[16] The Chairman of this Committee, Robert Bloch, pointed out in a March 1988 speech that since 1981, 212 corporate officials at all levels of management have been jailed for an average of about four and one-half months.[17]

Congress has raised the penalties for U.S. antitrust violations through legislation[18] and by establishing the Sentencing Commission, which issued the new Sentencing Guidelines.[19] The Guidelines, which apply to violations continuing or occurring on or after November 1, 1987, mandate larger fines for individuals and corporations based on the volume of commerce attributable to the defendant and subject to the conspiracy. In addition, unless extenuating circumstances apply, the Guidelines require judges to impose jail terms for individuals of a minimum of four months.

Price-fixing and bid-rigging offer the opportunity to fraudulently extract huge sums of money from unsuspecting

purchasers or consumers. As has been noted by many commentators, it is a rare individual who stumbles unknowingly into a price-fixing or bid-rigging scheme. Deterrence can only be achieved if the risks of being caught and appropriately penalized far outweigh the monetary lure of such crimes. It is our belief that the stricter approach being adopted in the U.S. is certainly worth due consideration in Canada and we are presently studying it.

Orders of Prohibition

In most prosecutions under the Competition Act, our counsel urge the court to grant an Order of Prohibition in addition to the fine levied. These orders are directed against the convicted corporations, as well as the officers and directors of the companies, and often against specified employees such as sales managers or marketing managers. The purpose of an order is to prohibit all of the anti-competitive conduct uncovered during the course of the Director's inquiry. The order may also contain provisions that enable the Director to monitor compliance with it and requirements that corporate employees be apprised of the Competition Act and the terms of the order. In the Business Forms prosecution, the court ordered the four convicted accused to publish an account of the Order in the Report on Business of a national newspaper and in two trade magazines. This type of provision is designed to advise the public generally and

purchasers particularly of the existence of the bid-rigging scheme and of the type of conduct that has been banned. In this way the public is aware of our enforcement activities, other firms are hopefully deterred from similar activity due to the enhanced public nature of the prosecution, and purchasers will be wary of such conduct in the future.

Obviously in any prosecution involving firms or individuals subject to an earlier order of prohibition, we recommend an appropriate remedy for the breach of an order which is, of course, contempt of court. We have had several cases involving such breaches and the fines for the contempt portion of the case have matched the fines for the antitrust violation.

From my experience, firms or individuals subject to a court order are less likely to be repeat offenders and have a heightened awareness of antitrust enforcement activity.

Immunity from Prosecution

One facet of enforcement strategy widely used in the United States is the granting of immunity from prosecution for individuals in return for complete cooperation as a witness. We are considering the merits of this type of approach in conjunction with our Department of Justice. In the past, in rare instances, immunity from prosecution has been granted, but we are now exploring with Justice the

wider use of this tool including the advisability of establishing guidelines for its use. We are mindful of the power of this procedure and of the need to exercise its use carefully and consistently. Requests for immunity must of necessity be considered on a case-by-case basis and one must take into consideration the value of the witness' evidence as well as his or her role in the illegal activity. To grant immunity to the kingpin in a bid-rigging scheme would ordinarily undermine our general enforcement strategy and would be unfair and discriminatory.

Conclusion

Next year marks the 100^{th} anniversary of the passage of Canada's original anti-combines or antitrust legislation. Over that period there have been numerous changes to the legislation and thousands of cases which have created jurisprudence defining the scope and breadth of our law.

In the end the goals of our legislation and of the various Acts in place in the United States are virtually identical, and the enforcement strategies adopted by the respective government agencies are very similar. We have learned from each other's experience and we continue to assess the value of the laws and practices in our two countries. Canada's merger law has received favourable U.S. commentary as has our level of fines for conspiracy cases. On the other hand, we are in the process of studying

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the merits of the increased use of jail terms against convicted individuals and the granting of immunity from prosecution.

In reporting to your clients on Canada's antitrust laws, you can advise them that the Director of Investigation and Research and his staff are committed to providing the business community with a complete understanding of the provisions of the Competition Act and our policy regarding its enforcement. We do have an open door policy and we are willing to provide advisory opinions to enable business persons to ascertain whether a proposed policy or plan would lead the Director to commence an inquiry.

I think it would be fair to say in summary that a good corporate citizen has nothing to fear from the provisions of Canada's Competition Act, but any corporation or individual engaged in price-fixing or bid-rigging will face the same tough-minded approach to investigation, prosecution and sentencing as they would expect in the United States.

Notes

1. Competition Act, R.S.C. 1970, c. C-23, as am. S.C. 1986, C.26.

2. Sherman Act, 15 U.S.C., secs. 1-8.

3. An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade, S.C. 1889, c. 41.

4. The Combines Investigation Act, S.C. 1910, c. 9.

5. Provisions dealing with price discrimination and predatory pricing first appeared in 1935 in the Criminal Code, R.S.C. 1927, c. 36, as am. S.C. 1935, c. 56, s. 9. In 1960, however, these provisions were incorporated into the Combines Investigation Act and that part of the Criminal Code was repealed, An Act to amend the Combines Investigation Act and the Criminal Code, S.C. 1960, c. 45, s. 13.

6. An Act to amend the Combines Investigation Act, S.C. 1951, c. 30, s. 1.

7. An Act to amend the Combines Investigation Act and the Criminal Code, S.C. 1960, c. 45, s. 13.

8. Bill C-256, Competition Act, 3rd Sess., 28th Parl., 1970-71.

9. An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend the Combines Investigation Act and the Criminal Code, S.C. 1974-75-76. c. 76.

10. Canadian Charter of Rights and Freedoms, Constitution Act, 1982, as enacted by Canada Act 1982 (U.K.) 1982, c. 11 [hereinafter the Charter].

11. The Supreme Court of Canada is currently considering appeals from City National Leasing Ltd. v. General Motors of Canada Ltd. (1986), 54 O.R. (2d) 626 (C.A.) and from A.G. Can. v. Quebec Ready Mix Inc, [1985] 2 F.C. 40 (C.A.).

12. Hunter v. Southam Inc., [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

13. R. v. Coastal Glass & Aluminum Ltd. (1984), 17 C.C.C. (3d) 313 at 325 (B.C.S.C.).

14. "Four Canadian Firms Are Fined $1.3 Million Total for Bid-Rigging," Wall Street Journal, June 10, 1988, at 29, reporting on R. v. R.L. Crain Inc., Sask. Q.B., June 9, 1988, Noble J. (unreported).

15. R. v. R.L. Crain Inc., N.S.S.C., June 8, 1988, MacDonald J. (unreported).

16. "Deterring Antitrust Crimes Through Stiffer Penalties," Remarks of Charles F. Rule, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, at the ALI-ABA Course of Study on "Antitrust Law," May 6, 1988, pp. 12-13.

17. "Compliance Programs and Criminal Antitrust Litigation: A Prosecutor's Perspective," Statement of Robert E. Bloch, Chief, Professions and Intellectual Property Section, Antitrust Division, U.S. Department of Justice, before the Antitrust Section of the American Bar Association, March 24, 1988, p. 2.

18. Criminal Fines Enforcement Act of 1984, 18 U.S.C. sec. 3623; Sentencing Reform Act of 1984, U.S.C., sec. 3571; Criminal Fines Improvements Act of 1987, sec. 6, Pub. Law No. 100-185, 101 Stat. 1279, 1280.

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19. Sentencing Guidelines and Policy Statement, United States Sentencing Commission (April 13, 1987).

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Speech

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

S-10132

BILATERAL ASPECTS OF CANADIAN COMPETITION POLICY

NOTES FOR AN ADDRESS

TO THE

AMERICAN BAR ASSOCIATION'S ANNUAL MEETING

BY

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CONSUMER AND CORPORATE AFFAIRS CANADA

TORONTO, AUGUST 9, 1988

Canada

I Introduction

More than 20 years ago, at the ABA meetings held in Montreal, a former Director of Investigation and Research dealt with a subject similar to the one I am addressing today.[1] It would be an understatement to say that the bilateral aspects of Canadian competition policy have changed since then. Passed in June 1986, the Competition Act[2] is a more effective statute than its predecessor, the Combines Investigation Act. The Canadian economy is maturing and while United States investment and sales in Canada are important and will continue to be so,[3] Canada's impact on the U.S. economy is more perceptible than it was in the past.

Canada-U.S. trade has always been important to the economies of both countries. Approximately 80 percent of Canadian exports go to the United States and more U.S. exports go to Canada than to any other nation. Our two countries have the largest bilateral trading relationship in the world. The prospect of a comprehensive Free Trade Agreement between Canada and the United States will serve to increase the economic links between the two countries, as tariff and other trade barriers are removed.

While the impact of the Agreement on competition will be favourable, both countries will have to meet new challenges in the administration of their respective antitrust laws. One such development is the rationalization of industry

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structure to increasingly reflect North American rather than national markets. To some extent, this integration of markets is already occurring. It is fair to predict that this restructuring will lead to an increasing number of issues, many of them of a bilateral nature, that the competition authorities of both countries will have to address.

Today, I would like to give you some insight into the approach that is being followed in Canada to come to grips with the challenges of bilateral competition issues. First, I will briefly discuss recent changes in the Canadian law and how it compares to that of the United States. In this regard, I will highlight some of the features unique to the Canadian economy that have been factored into the Competition Act.

Bilateral competition policy issues arise more often in the context of merger review. I will therefore explain the approach taken toward mergers and foreign competition, and will illustrate this approach by referring to some recent Canadian cases.

Next, I will make some observations on the largely untested application of Canadian competition law in relation to extraterritorial matters. I will also present a summary of the notification and consultation arrangements that exist today between Canadian and U.S. authorities.

Finally, I will comment on the likely course of future competition policy developments fostered by the Free Trade Agreement.

II <u>A Comparison of Canadian and U.S. Competition Policies</u>

The approach chosen in the overall development of the Competition Act has been influenced, to a large extent, by certain distinguishing features of the contemporary Canadian economy. The small and geographically segmented nature of most Canadian markets often leads to high levels of domestic industry concentration. However, despite their large size relative to the domestic market, many Canadian companies may still be too small to achieve an efficient scale of production. These structural characteristics of the Canadian economy often dictate that our competition policy must have a high regard for the efficient allocation of resources and industry performance rather than promoting competition for competition's sake. In addition, the openness of the Canadian economy to trade with other countries assigns an important role to foreign competition in the implementation of competition policy.

It is worth noting how the distinguishing features of the Canadian economy are reflected in the purpose clause of the Competition Act. Section 1.1 reads:

> "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."

It would be fair to say that this clause places stronger emphasis on international competition than that found in the corresponding U.S. legislation.

As stated in the purpose clause of the Act, the maintenance of competition is not viewed as an end in itself. Rather, it is viewed as a vehicle for promoting a diverse set of objectives relating to the efficiency of the national economy and its performance in meeting the needs of various participants. Fostering a competitive marketplace promotes the interests of consumers and business firms. In my view, it is also important that the law only intervene when required and then only to the extent necessary to protect competition. There is, therefore, a need for a variety of enforcement mechanisms and the adoption of a flexible approach to the administration and enforcement of competition law, as discussed later in my speech.

The array of enforcement mechanisms is reflected in the Act which contains criminal as well as non-criminal law provisions. The former are adjudicated before the criminal

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courts; the latter cover a number of matters, most importantly mergers, which, on application by the Director, may be reviewed by a specially created adjudicative body, known as the Competition Tribunal.[4]

While Canada's distinguishing features are reflected in the Competition Act and its administration, that is not to say that the competition laws of our two countries are vastly different. There has been a fair degree of convergence between Canadian and U.S. competition policies over the past decade. To a large extent, this is because past U.S. experience was considered closely in framing the Competition Act.[5] In both countries, the evolution of competition policies and legislation reflects advances in economic thought and a broad consensus regarding the goals of competition policy which transcend national boundaries.

The converging trend between Canadian and U.S. competition policies is most visible in the area of mergers. Because this is such an important area of bilateral antitrust matters, I will comment specifically on mergers and foreign competition in a few minutes.

Another area where there has been a fair degree of convergence between Canadian and U.S. competition policies is that of non-price vertical restraints. In Canada, tied selling, exclusive dealing and territorial market restriction are all subject to a case-by-case approach which is codified in the Competition Act. It is broadly analogous to

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the rule of reason approach to territorial restraints laid down in the well-known U.S. Supreme Court Sylvania decision.[6] One difference between the two sets of laws in this area is, that in the United States I understand, tying arrangements are subject to a nominal per se prohibition. It is generally recognized, however, that the 1984 U.S. Supreme Court decision in the Hyde case has limited the application of the per se rule in this area.[7] Through such decisions, the U.S. law regarding non-price vertical restraints is coming closer to Canada's.

One area of competition policy that has generated some recent discussion in the United States and Canada is that of resale price maintenance. Under the Competition Act, attempts to influence upward or discourage the reduction of prices by a firm are subject to criminal prohibition. The Act also contains related prohibitions respecting refusal by a manufacturer to supply to price discounters (paragraph 38(1)(b)) and attempts to induce such refusal to supply by any other person, e.g., competing distributors, (subsection 38(6)). These provisions contain no general exception analogous to the U.S. Colgate doctrine, which permits unilateral -- as distinct from concerted -- attempts to set resale prices.[8]

It should be noted that the Competition Act provides exceptions from the prohibition of refusal to supply to price discounters in certain well-defined circumstances

(subsection 38(9)). These include situations where a distributor has failed to provide a level of service that might reasonably be expected by consumers. To some extent, these exceptions accommodate the procompetitive rationales for resale price maintenance that have been put forward in modern antitrust literature. The exceptions apply, however, only to the offence of refusal to supply and not to the basic prohibition of price maintenance activities in the Act.

Significant differences exist in certain other provisions of our respective competition laws. The clearest example is in the area of naked price fixing and market allocation arrangements, which are treated as illegal per se under section 1 of the Sherman Act. In Canada, such arrangements are illegal only if they are shown to meet the test of lessening competition unduly. I should point out, however, that the maximum fine for price fixing in Canada is $10 million as compared to only $1 million in the United States. Bid-rigging is treated under a separate provision as a per se offence, that is, an offence which does not require proving any undue effect. In addition to fines, individuals convicted of price fixing and bid-rigging may also be sentenced to jail terms.

As far as the monopoly law is concerned, the Competition Act is now conceptually more similar to article 86 of the Treaty of Rome than to section 2 of the Sherman Act.

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Since the 1986 amendments to the Act, the non-criminal abuse of dominance provision (section 51) provides for remedial orders in instances where a dominant firm or firms are shown to have engaged in a practice of anticompetitive acts which result in a substantial lessening of competition.

Another 1986 amendment, inspired by the European experience, is the specialization agreement provision (section 58) which confers an exemption from the conspiracy law to agreements designed to specialize production for the purpose of achieving efficiency gains. These agreements must be approved and registered before the Competition Tribunal, with notice of any such application to be given to my office.

Other important differences can be identified in the area of competition law enforcement procedures and patterns. In contrast to the United States, where a significant portion of antitrust litigation is initiated by private parties, Canada has seen very little private competition law enforcement. This reflects procedural differences such as the absence of treble damage claims in Canada as well as uncertainty among some members of the Bar regarding the constitutional status of the private cause of action conferred in the Act since the earlier 1976 amendments. On this last point, the Ontario Court of Appeal as well as the Federal Court of Appeal have both recently upheld the constitutionality of the private action provision in the

Competition Act. The case is now before the Supreme Court of Canada.[9] One should also note that under the Act, recovery of damages by private action is limited to damages caused by conduct contrary to a criminal provision in Part V of the Act or by failure to comply with an order made by the Competition Tribunal or other court under the Act.

Another set of differences arises from the exemptions and immunities granted under the two countries' respective competition laws. For example, while there is an exemption for export activities in both countries, Canada does not impose any compulsory registration of export cartels. In addition, the jurisprudential protection for regulated activities, known as the regulated conduct defence[10] in Canada, and the state action doctrine in the United States, are expressed in different terms.

Still on the subject of enforcement activity, in Canada, we are convinced that a compliance-oriented approach is the one most conducive to achieving the goals of timely and effective enforcement of the criminal as well as non-criminal provisions of the Act. Accordingly, every reasonable opportunity is provided for business persons to structure their affairs within the limits of the law. This approach allows the use of formal contested proceedings to be narrowed to the more serious and contentious cases. That does not mean, however, that when formal litigious proceedings have proven necessary, we have been reluctant in any

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way to use them. I think it is fair to say that the approach being taken by U.S. authorities is, in broad terms, similar. Moreover, we in Canada are beginning to make much more use of consent prohibition orders, recognizing the role that consent decrees have played in the United States in achieving expeditious and effective resolution of many anti-trust cases.

III <u>Mergers and Foreign Competition</u>

The new law dealing with mergers is the most important and far-reaching reform brought about by the passage in 1986 of the Competition Act. Under section 64 of the Act, the basic test which must be met before a merger or acquisition can be successfully challenged is whether a merger or proposed merger "prevents or lessens, or is likely to prevent or lessen, competition substantially." In the United States, the test in section 7 of the Clayton Act is whether the effect of the merger "may be substantially to lessen competition or to tend to create a monopoly."

While on the face of it, the substantive language of the Canadian and American merger test is similar, there are important statutory differences. For example, the Canadian legislation contains a non-exhaustive list of factors to be considered in assessing a merger, and a specific direction to the Competition Tribunal not to base its decision solely on quantitative criteria such as concentration and market

share. This latter provision, which ensures that the assessment of mergers is more than a numerical exercise, is especially appropriate given the relatively high levels of concentration common in many Canadian markets. An additional example is the specific section in the Canadian legislation governing the application of the efficiency exception, which I will discuss later on.

A merger is defined in section 63 of the Act as meaning: "the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person."

In addressing whether a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to any factor relevant to competition in a market. However, seven factors are referred to expressly in the statutory list. These are:

- the extent of effective foreign competition;
- the possibility of a failing business;
- the availability of acceptable product substitution;
- the existence of any trade, regulatory or other barriers to entry;
- the extent of effective competition remaining in a market;

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- the removal of a vigorous and effective competitor; and
- the nature and extent of innovation.

These factors have been drafted in neutral terms and each forms an important element in the balancing process essential to effective merger analysis. Generally speaking, these factors are somewhat similar to those contained in the U.S. Department of Justice Merger Guidelines.

Another feature of the new Canadian merger law, and arguably the one which best characterizes the Canadian approach to merger policy, is the efficiency exception for mergers. In incorporating an efficiency exception, the Act expressly recognizes that the restructuring of an industry through a merger can, in certain circumstances, result in net benefits for the Canadian economy.

The new merger law provides that the Tribunal shall not prohibit a merger or proposed merger if the parties satisfy the Tribunal that the merger has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition resulting from the merger, and that the efficiency gains would not likely be attained if an order were made (section 68). In recognition of the importance of foreign trade to the Canadian economy, the Act also explicitly directs the Tribunal to consider whether such efficiency gains would result in significant increases in the real value of exports or in significant import

substitution. This provision goes somewhat further than anything contained in the Clayton Act or even in the Antitrust Division's Merger Guidelines where efficiency gains are a factor to be considered rather than a specific exception.

In practice, the responsibility for establishing the existence of efficiency gains lies with the merging parties. In jurisdictions such as the United States, the onus is placed on the parties claiming efficiencies to show by clear and convincing evidence that these efficiencies are likely; that they are a direct result of the merger; and that they are not attainable otherwise.

A fundamental procedure required in the assessment of the competitive effect of a merger is defining the relevant market that will be affected. In many instances the relevant market affected by the merger may be national or part of the country; in other instances the market affected may be North American or worldwide in scope. However, the Competition Act concerns itself with competition in Canada. This means that any damage done to competition must be felt in Canada. The influence of actual and potential foreign competition -- competition from sources outside Canada -- is taken into consideration. Even in those situations where the relevant market is local or national, the close proximity of the United States to these markets may facilitate a source of potential competition. Consequently, assessing

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the competitive impact of a merger will also entail consideration of whether or not foreign competition that exists outside the relevant market is likely to constrain the exercise of market power which a merger may otherwise give rise to. Overall, the approach adopted in defining the relevant market is quite similar to the procedure employed by U.S. antitrust authorities.

In addition, we recognize that the ability of foreign firms to actively compete in Canadian markets is subject to the effect of tariff and non-tariff barriers, variations in exchange rates and other considerations. Consequently, these factors are taken into account when assessing the competitive significance of foreign firms in Canadian markets. Thus, the Canada-U.S. Free Trade Agreement is likely to have a significant influence on the extent to which U.S. competition is a factor in assessing the impact of a merger.

Since the passage of the Competition Act, a number of significant mergers have occurred where actual or potential foreign competition was a significant factor in the decision not to challenge the transaction. Early in 1987, the New Zealand conglomerate Fletcher Challenge proposed to acquire a controlling interest in B.C. Forest Products Limited. I ultimately decided that this transaction was not likely to lessen competition substantially. This conclusion was based in a large part on the existence of alternate, foreign sources of supply, including sources in the United States.

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Later in 1987, I decided not to oppose the acquisition by Amoco Canada Petroleum Company Ltd. of Dome Petroleum Limited. Here too, my concerns about this merger were tempered by the impact of international market forces on competition in the Canadian market for certain gas liquids, such as propane.

In May of this year, I decided not to apply to the Competition Tribunal for an order prohibiting Nova Corporation of Alberta from acquiring a significant interest in Polysar Energy and Chemical Corporation. I noted that the petrochemical derivative markets for the products affected by the transaction were North American in scope and very competitive. In addition, consideration was given to the fact that implementation of the Free Trade Agreement between Canada and the United States is expected to make these markets even more competitive. However, given the number of variables that exist, my staff will be monitoring the impact of this transaction on competition in the production and supply of ethylene. The merger provisions of the Act provide for a three-year period after substantial completion of a transaction during which I may apply to the Competition Tribunal for a remedial order.

Another element of the role of foreign competition relates to the consideration of efficiency gains that may be realized through a merger. With the prospect of free trade on the horizon, some Canadian firms may find it necessary to rationalize their production and distribution networks

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to meet the competitive challenge. In some instances, this rationalization process may best be accomplished through a merger. In fact, there have already been merger cases in which the parties have raised efficiency arguments with us which were based on the possibility of further liberalization of Canada-U.S. trade.

A key element in ensuring the efficacy of a merger law is taking appropriate action to block an undesirable merger in a timely manner. In nearly all cases, this means before the transaction has been completed, since the appropriate remedy may be precluded by the inability of the Competition Tribunal to return the new entity to its pre-merger state.

To achieve this goal, Part VIII of the Act requires that parties to a transaction (generally asset and share acquisitions, corporate amalgamations and business combinations as described in section 82) notify my office if the proposed transaction exceeds two general types of thresholds:

(1) the parties, together with their affiliates, must have total assets in Canada, or total annual revenues from sales in, from, or into Canada of over $400 million; and

(2) the value of the assets in Canada or shares to be acquired, or the gross revenues flowing from them, must exceed $35 million, or $70 million in respect of an amalgamation.

Once notification is given, the parties to the merger are required to wait from 7 to 21 days, depending on the type of filing, before completing the merger. After the waiting period, the parties may complete the transaction unless the Director has proceeded to obtain an injunctive order from the Competition Tribunal.

Irrespective of the nationality of the parties to a proposed merger transaction, if there is a Canadian business involved and the aforementioned thresholds as specified in the Act (sections 81 and 82) are exceeded, then the parties must prenotify the Director of the proposed merger. For example, if two U.S. companies planned to merge and the company being acquired had a Canadian affiliate and the thresholds were exceeded, then one or both of the U.S. companies would have to prenotify. The same rules apply if a U.S. company is buying a Canadian company. As well, if a Canadian company is preparing to acquire a U.S. company that directly or through an affiliate, has assets or sales in Canada, and the relevant thresholds are exceeded, notification is required. Under the Canadian law (section 86) only one party need prenotify. In most cases, the acquiring firm prenotifies. These are just some illustrations of the scope of the Canadian notification provisions.[11]

To conclude my remarks on prenotification, I want to stress that all mergers are subject to scrutiny by my office under section 64, whether they have to be prenotified or

not. The substantive merger provisions apply equally to all mergers of all sizes whether they involve domestic parties or foreign investors.

As far as our general enforcement approach to mergers is concerned, only a small percentage of merger cases have involved applications to the Tribunal. Because the Act permits it, our approach is flexible.[12] We have a variety of instruments available for the resolution of merger matters: advance ruling certificates, provided for under section 74 of the Act, and if issued, section 75 ensures parties that I will not challenge a merger based on the same or substantially the same information as that on which the certificate was issued;[13] advisory opinions, which may include preclosing restructuring, i.e., a fix-it first approach; monitoring, in accordance with the three-year statutory period in which a merger may be challenged; undertakings, for post-closing restructuring or other actions; applications to the Tribunal for consent orders; and, of course, contested applications before the Competition Tribunal.

I mention these mechanisms simply to show that we are not locked into one fixed process. For example, in the acquisition of the cookie and cracker assets of the Interbake Foods division of Weston Foods Ltd. by Nabisco Brands Ltd. the acquisition was restructured before closing to address concerns under the Act. Whenever possible, when

remedial action is required, we prefer to see preclosing restructuring although we recognize that in some cases it is impractical. An example of an undertaking for post-closing action was the case of the Canada Safeway/Woodward acquisition. Here, Canada Safeway undertook to divest itself of 12 supermarket stores in a number of geographic markets in Alberta and British Columbia within a specified period of time to address competition concerns under the Act.

Let me give you a few figures to indicate what has been happening with merger review in Canada. As of the end of July 1988, the Bureau has completed its examination of 212 merger transactions. Only those that required more than two days of examination are included. Of these, five have been restructured, two before closing and three with post-closing undertakings, and five have been abandoned for reasons in whole or in part related to the position I have taken. Two mergers are currently before the Tribunal and in two other matters applications were made to the Tribunal. The rest have been allowed to proceed as proposed although some are subject to a specific monitoring program.

In my view, merger review in Canada is working well. The Act is flexible enough to enable the great majority of mergers to proceed as originally proposed while safeguarding the Canadian marketplace in relation to those that raise material concerns.

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Having outlined the enforcement policy on mergers in Canada and the role of foreign competition, I will now address some aspects of the question of extraterritoriality.

IV International Aspects of the Administration of the Competition Act

1. Exercise of Jurisdiction of the Competition Act

I am sure that you are all familiar with the recently released U.S. Department of Justice Proposed Antitrust Guidelines for International Operations.[14] There have been no Canadian decisions dealing with the extraterritorial application of the Competition Act. This is a complex issue, complicated by the existence of the international law doctrines of non-interference and international comity which must be taken into consideration. Therefore, it is difficult to provide guidance on the scope of the Competition Act but it may be useful to refer to some general Canadian jurisprudence and direct your attention to specific provisions of the Act which apply to transborder situations.

As I have already said with respect to mergers, the Competition Act concerns itself with competition in Canada. The influence of actual and potential foreign competition is considered in the analysis as has been illustrated. Further, as a general law of general application, the administration and enforcement of the Canadian Competition Act is compatible with the principle of national treatment.

In other words, it applies without distinction to firms, Canadian controlled or foreign controlled, that are operating in Canada. The Act prohibits specific conduct; those who engage in such conduct in whole or in part in Canada are subject to proceedings under our Act.

However, it may be argued that the extraterritorial scope of the Competition Act varies according to the provision being interpreted since the Act contains criminal and non-criminal law provisions. In Canada, criminal and non-criminal law provisions are subject to somewhat different interpretation rules.

Generally, the interpretation of Canadian statutes rests on a long standing tradition, elaborated by British[15] and Canadian courts, which dictates that criminal legislation is to be interpreted as receiving territorial application unless specifically provided otherwise. Based on this interpretation rule, the state's law traditionally applies where an offence occurs in whole or in part in its territory.

In 1985, the Supreme Court of Canada handed down a landmark decision in the criminal case of Libman v. The Queen.[16] The decision appears to widen the doctrine of territoriality by providing that a sufficient nexus may be established between an offence and Canada when merely an element of an offence is carried out in Canada.[17] The nature of the necessary element may be identified on a case-

by-case basis according to the offence. The Supreme Court of Canada has defined the test as requiring a real and substantial link between the element of the offence and Canada. In certain instances, the element establishing the required nexus may seem more tenuous than has historically been the case. Criminal law in this area is still evolving.

Interpretation of non-criminal laws also starts with the doctrine of territoriality. However, the presumption of territoriality is somewhat easier to rebut than is the case in criminal law.[18]

As a result, arguments can be made that many of the criminal and non-criminal provisions of the Competition Act may have an extraterritorial application; in any event, certain sections of the Competition Act are clearly applicable to transborder situations.

First, sections 9(2) and 14 of the Act dealing with investigatory powers could, under certain circumstances, have an extraterritorial effect. With respect to orders for oral examination and production of documents, section 9 of the Competition Act stipulates that these powers can be exercised after a judge is satisfied that there is an inquiry in progress and that the persons subject to the order have or are likely to have information relevant to the inquiry. Where an order for production of records under paragraph 9(1)(b) is sought against a corporation, that corporation may also be ordered to produce records in the possession of an affiliate, whether the affiliate is located in or outside Canada (subsection 9(2)).

Similarly, in searching premises, a person authorized to do so by a warrant issued under section 13 of the Competition Act may, pursuant to section 14, "use or cause to be used any computer system on the premises" to search for relevant evidence. Subsection 14(1) also states that "...any data contained in or available to the computer system..." may be searched for. Where the main data bank is located outside Canada, this section of the Act implies that information may be accessed through this use of the computerized system. The evidence so gathered will be admissible in subsequent proceedings under the Competition Act.

The application of these investigatory powers is a matter subject to notification procedures as provided for in the Canada/U.S. Memorandum of Understanding on Antitrust Matters. In a few minutes, I will be discussing at greater length the nature of the notification and consultation mechanism.

Second, other sections of the Act specifically deal with competition problems arising from the implementation in Canada of measures taken abroad. For instance, section 32.1 makes it a criminal offence for a corporation to implement, in whole or in part in Canada, a directive emanating from a person outside of Canada for the purpose of giving effect to a conspiracy entered into outside Canada which would contravene the general conspiracy provision of the Act (section 32). This principle is compatible with subsection

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423(4) of the Criminal Code of Canada[19] addressing conspiracy abroad to commit a crime in Canada. A similar non-criminal provision can be found in paragraph 55(1)(b) of the Act which enables the Competition Tribunal to issue a remedial order against a person in Canada engaged in similar conduct.

In cases where an order has been rendered by a foreign adjudicative body, the Competition Act allows for the issuance of an order to prevent the implementation in Canada of foreign judgments (section 54), or foreign laws and directives (section 55) which would adversely affect competition in Canada. These provisions reflect well established principles of international law pertaining to the sovereignty of states. Canada has consistently defended those principles in international forums, such as the OECD.

And third, the Competition Act contains a provision (section 56) which deals with refusal to supply by a foreign company. It provides for any person in Canada who benefits from this refusal by the foreigner to be ordered to sell the product at the laid-down cost in Canada or to stop dealing in such product in Canada. This particular section is an aftermath of the Japanese Drum[20] case and addresses a particular set of circumstances; as such it should be viewed as an exceptional measure and not an indication of the overall operational scope of the Competition Act.

I should also point out that in cases where the extra-territorial operation of a criminal provision of the Act is

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uncertain, there is still the possibility of a prosecution being initiated under subsection 423(4) of the Criminal Code of Canada. This subsection deems persons conspiring outside Canada to commit an offence in Canada to have conspired in Canada. It also extends the reach of Canadian criminal law to specific kinds of offensive activities occurring outside its boundaries.[21] Therefore, if, for example, persons conspire outside Canada to engage in bid-rigging in Canada, the Attorney-General of Canada could proceed against them for a breach of the Criminal Code. A prior acquittal or conviction in another jurisdiction based on similar facts, however, may give rise to the special defences of "autrefois acquit" or "autrefois convict" under subsection 423(7) of the Criminal Code. Obviously, the nuances and applications of these provisions to particular fact situations is beyond the scope of this speech and these comments are intended only as a general outline.

I can only reiterate that this is a complex area in Canadian law, and that to date we have not had a full consideration of the problems by Canadian courts. While we have not incorporated the American approach to extraterritoriality into our Competition Act, and although Canadian law in this field is evolving, we continue to defend an approach based on cooperation to avoid conflicts of jurisdiction. This explains Canada's commitment to co-operative avenues to avoid problems created by the extraterritorial application of one country's laws and regulations.

2. Notification and Consultation with U.S. Authorities

Notification and consultation procedures between Canada and the United States, as well as between the member countries of the OECD, have been agreed upon to avoid or moderate conflicts of interests and policies concerning the application of our respective antitrust laws. These arrangements are governed by the 1984 Canada/U.S. Memorandum of Understanding on Antitrust Matters and by the 1986 Recommendation of the OECD Restrictive Business Practices Committee.[22]

Generally speaking, under these arrangements, an official notification is given when an investigation involves obtaining information and/or contemplation of enforcement action that is likely to affect a foreign country's national interest. Such notifications should be made, if possible, at least ten business days before any of the information gathering or enforcement action is initiated.

Provisions for consultation, included in these arrangements, ensure that each party will give serious consideration to any information and views expressed in the course of the consultation. Requests for such consultation must be made and honoured promptly. The matters that are subject to the consultative process can encompass all aspects of a given notification, notably the access to the information within the territory of the notified country and various

"significant national interests" of the notified country. The "significant national interests" are not specifically defined but it is recognized that such interests would normally be reflected in antecedent laws, decisions or statements of policy by the appropriate authorities. Although arrangements such as the OECD Recommendation allow for "good offices for the purpose of conciliation," the entire consultative process is not binding upon any of the parties; rather, it is based solely on the good faith and good will of each of the parties involved. In the Canada-U.S. notification and consultation process, for instance, each of the parties have shown a remarkable willingness to reduce, by accommodation and compromise, the scope and intensity of the conflicts that could have arisen from the application of our respective antitrust laws.

For obvious reasons, all exchanges of information between antitrust authorities under the notification and consultation arrangements are exchanges of confidential information unless otherwise indicated. Furthermore, it is explicitly recognized under the Memorandum of Understanding between Canada and the United States that there may be limitations imposed by the laws of both countries on the disclosure by one party to the other of certain classes of information each possesses. In Canada, for instance, the disclosure of information to foreign antitrust authorities may be affected by the confidentiality restrictions contained in section 27 of the Competition Act.

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In addition, mechanisms for the gathering of evidence will exist once Canada's Mutual Legal Assistance in Criminal Matters Act is proclaimed in force. That legislation implements the yet to be ratified 1985 Canada-United States Legal Assistance Treaty.

To have a better idea of the extent of the use of the official notification procedures between Canada and the United States, let me quote the number of notifications exchanged. For the fiscal year ending March 31, 1988, Canada sent 13 official notifications to the U.S. authorities, most of them involving the gathering of third-party information in the United States. We received 24 official notifications from the United States. About two-thirds of all notifications between our two countries were related to merger investigations. The large number of notifications is certainly a reflection of the economic links between Canada and the United States.

In addition to official notifications and exchanges of information, we frequently have informal consultations with the U.S. Department of Justice and the Federal Trade Commission. Meetings are conducted in Washington or in Ottawa and involve discussion of a broad range of issues related to antitrust co-operation, in particular in the area of merger enforcement. Along with the formal procedure for notification and consultation, these meetings have provided a very useful means of achieving the aims of the respective

antitrust laws and in alleviating the conflicts that could otherwise have arisen. As well, informal telephone discussions frequently take place to assist in the identification of experts in specific fields and to share experiences on the handling of certain types of cases. I am pleased to say that a very good working relationship has been established between the Bureau of Competition Policy and the two U.S. antitrust authorities just mentioned. This working relationship operates to our mutual benefit in enforcing antitrust laws.

V Competition Law in the Era of Canada-U.S. Free Trade

I have so far focused on how free trade and competition policy complement each other and the probable impact of free trade on enforcement activities. However, it is also necessary to consider whether Canadian or U.S. competition policies could act, in any respect, as barriers to efficient business activities within the proposed free trade area. One way in which this could conceivably occur would be through differences in the two countries' substantive competition laws or enforcement policies.

As I outlined earlier, there has already been considerable convergence between Canadian and U.S. competition policies. The key issue is whether the remaining differences in substantive provisions, procedural matters and exemptions and immunities may create trade distortions. As

far as substantive laws are concerned, given that competition laws reflect the principle of national treatment, the potential for trade distortions does not appear to be significant. In some circumstances, however, firms may be affected by differing rules applicable to particular business arrangements. For example, a distribution arrangement using a resale price maintenance scheme might prove unlawful under Canadian law but not under U.S. law. Accordingly, as the Canadian and U.S. markets become more integrated with the elimination of market segmentation by border measures, it may be worthwhile to give consideration to the desirability of further harmonization of substantive aspects of Canadian and U.S. competition policies. In any case, greater convergence would clearly serve to mitigate "jurisdiction-shopping" by counsel in both countries.

Differences in procedures, while potentially significant for the conduct of particular business activities, are unlikely to generate sizeable trade distortions. The issue of exemptions and immunities may, however, require further consideration. Some may argue that the provision of an exemption under competition laws for export activities within the free trade area may be at odds with the purposes of the Agreement. By allowing domestic firms to form a cartel for export purposes, a different treatment is imposed between activities pertaining to the domestic market and those directed at the foreign market. The extent to which

these export exemption provisions remain in the law in relation to the proposed free trade area, however, is a question for consideration.

Government activities can also influence the state of competition in domestic markets which in turn can generate a spill over effect in foreign markets. In this regard, Article 2010 of the Free Trade Agreement requires that the government ensure by regulatory supervision, administrative control, or the application of other measures that a state designated monopoly shall not discriminate in its sales against goods or persons of the other party, or engage in anticompetitive practices adversely affecting a person of the other country in markets other than those for which it has been designated a monopoly. The use of competition laws might provide an effective mechanism for this purpose although they are not noted explicitly in this regard in the Agreement.

One further issue of significant interest from the competition policy perspective that remains to be studied under the Free Trade Agreement is the question of trans-border pricing practices. The Agreement provides for the creation of a Working Group which will look at the possible development of a substitute regime to existing trade remedy laws within the next five to seven years. In this context, the use of domestic competition laws to deal with anticompetitive pricing practices in transborder trade, as an alter-

native to existing antidumping laws, may deserve further attention.[23] It is worth noting that in the European Economic Community, member states do not apply independent national antidumping laws against other member states. Rather, anticompetitive pricing practices are dealt with under the abuse of dominant position provision of the Treaty of Rome.

VI Concluding Remarks

In conclusion, interesting challenges relating to the bilateral aspects of Canadian competition policy will likely arise with the Free Trade Agreement. With the Competition Act in place and operating effectively, and with an established system of co-operation between the Canadian and U.S. competition authorities, there is no reason why these challenges cannot be successfully met.

Thank you.

FOOTNOTES

1. Henry, D.H.W., "Mergers and Joint Ventures as They Affect Canadian-United States Trade and Relations - A Look at the Canadian Antitrust Laws", Antitrust Law Journal, Volume 32, pp. 156-175.

2. Competition Act, R.S.C. 1970, chapter C-23 as amended.

3. There is a high degree of foreign and particularly U.S. ownership of Canadian industry. For example, it has been estimated by officials of the Bureau of Competition Policy that in 1987, 57 percent of all acquisitions in Canada involved an acquiring company that was foreign owned or controlled. Furthermore, 66 percent of these foreign firms were U.S. owned or controlled. Accordingly, Canadian competition policy is very often of direct interest to U.S. and other foreign interests.

4. Competition Tribunal Act, S.C., 1986, c. 26. For a discussion of the Tribunal's role, see my speech at the Fordham Corporate Law Institute cited in note 5.

5. I will not outline the 1986 amendments in detail here because I have done so elsewhere on a number of occasions. The following speeches are ones which summarize the major amendments in the Competition Act, and are available from the Compliance and Coordination Branch of the Bureau of Competition Policy:

- International Bar Association (New York, New York) - September 1986
  Title: New Canadian Law on Mergers, Joint Ventures, and Notifiable Transactions (S-11302).

- Law Society of Upper Canada/Canadian Bar Association (Ontario) (Toronto, Ontario) - September 1986
  Title: New Developments in the Enforcement of Canadian Competition Law (S-11304).

- Fordham Corporate Law Institute Fourteenth Annual Conference (New York, New York) - October 1987
  Title: The New Merger Provisions of the Competition Act of Canada (S-10024).

6. 433 U.S. 36 (1977).

7. 104 S. Ct. 1551 (1984).

8. 250 U.S. 300 (1919).

9. See City National Leasing vs. General Motors of Canada and Rocois Construction Inc. vs. Quebec Ready Mix et al. These cases were jointly heard May 17-18, 1988, and the decision has been taken under advisement.

10. See the following speech:
    - Canadian Association of Members of Public Utilities Tribunals (Saskatoon, Saskatchewan) - September, 1986
      Topic: The Competition Act as it Relates to the Regulated Sector (S-86-45).

11. More detail is provided in my speech at the Fordham Corporate Law Institute (cited in note 5) and the speech which Howard I. Wetston, Senior Deputy Director of Investigation and Research, is delivering at this conference. It is worth noting that between July 15, 1987, when the notifiable transaction provisions came into force, and the end of July 1988, we have reviewed 92 prenotification filings. That is a great number of very large transactions considering the size of the notification thresholds.

12. More details on these various approaches to the resolution of merger matters can be found in the following speeches:

- Fordham Corporate Law Institute as cited in note 5.

- Corporate Counsel Section of the Canadian Bar Association - Ontario (Toronto, Ontario) - January 1988
  Title: Merger Review Under the Competition Act: Past, Present and Future (S-10056).

- Canadian Bar Association - Alberta Business Law Section (Edmonton, Alberta) - February 1988
  Title: Merger Review in Canada: Twenty Months of Experience Under the Competition Act (S-10028).

- L'Université Laval, The New Competition Law Conference - (Quebec, Quebec) April 1988
  Title: Notes for an Address on Compliance and Mergers (S-10072).

- Women in Food Industry Management (Toronto, Ontario)
  - March 1988

  Title: Mergers and Acquisitions in the Food Industry Under the Competition Act (S-10070).

13. As of the end of July 1988, we have received 71 requests for Advance Ruling Certificates. Of those requests, we have issued 45 certificates, 10 have resulted in the issuance of an advisory opinion in lieu of an Advance Ruling Certificate, while 8 are still under review. In the remaining cases either the transaction was abandoned following the request for an Advance Ruling Certificate, or the parties were given a negative response and did not pursue the matter. As of the end of July, more merger matters have been resolved through the issuance of Advance Ruling Certificates (45) than through advisory opinions (31) under the program of compliance.

14. U.S. Department of Justice Draft Antitrust Guidelines for International Operations (June 8, 1988).

15. Such decisions as: R. v. Holmes, [1883], 12 Q.B.D. 23;
    R. v. Peters, [1886], 16 Q.B.D. 636;
    R. v. Ellis, [1899], 1 Q.B. 230;
    Treacy v. DPP, [1971], A.C. 537;

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DPP v. Doot, [1973], A.C. 807;

illustrate the British approach.

16. Libman v. the Queen, [1985], 2 S.C.R. 178.

The Supreme Court re-examined the existing British and Canadian cases on this point and provided the following definition of the doctrine of territoriality which governs the applicability of Canadian criminal laws to a given conduct:

> "It is sufficient that there be a real and substantial link between an offense and this country, a test well-known in public and private international law"..."Just what may constitute a real and substantial link in a particular case I need not explore... the outer limits of the test may, however, well be coterminous with the requirements of international comity." (page 213)

17. Note that under section 5(2) of the Criminal Code, except where otherwise provided, no person shall be convicted of an offence committed outside Canada. The meaning of committed outside Canada is not defined.

18. Driedger, E.A., Construction of Statutes, Second Edition, Canadian Legal Manual Series, Butterworths, Toronto, 1983, page 218, quoting, to that effect:

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- Tomalin v. Pearson & Son, [1909], 2 K.B. 61
- Attorney General for Ontario v. Reciprocal Insurers, [1924] A.C. 328 at page 345, and
- Air India v. Wiggins, [1980], 2 All.E.R. 593.

19. Criminal Code, R.S.C. 1970, Chap. C-34 as amended.

20. In that case, a Burlington, Ontario musical instrument dealer claimed he had lost his franchise due to pressures brought to bear on the Japanese company that was supplying him with drums. It was alleged that the American parent of a rival Canadian dealer threatened the Japanese firm with loss of distribution of their products and the U.S. market unless the exclusive Ontario franchise was awarded to the subsidiary.

21. Canadian courts apply section 423(4) of the Criminal Code to provisions of other federal statutes such as the Narcotic Control Act R.S.C. 1970, Chap. N-1 as amended. See, for example R. v. Lai and Law, supra note 6. Subsection 423(3) of the Criminal code introduces a specific additional jurisdictional rule whereby persons in Canada conspiring to commit an offence outside Canada are deemed to have conspired to commit that offence in Canada.

22. Revised Recommendation of the OECD Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Document [C(86) 44(Final) May 1986] and Memorandum of Understanding between the Government of Canada and the Government of the United States of America as to notification, consultation and co-operation with respect to the application of national antitrust laws 1984.

23. See the following speech that I delivered on this topic:

Canada/United States Law Institute of Case Western Reserve University School of Law (Cleveland, Ohio) - April, 1987.
Title: Competition, Anti-dumping and the Canada-U.S. Trade Negotiations (S-11293).

Speech

Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

NOTIFIABLE TRANSACTIONS

UNDER THE COMPETITION ACT

NOTES FOR AN ADDRESS TO THE

1988 ANNUAL MEETING OF THE

AMERICAN BAR ASSOCIATION-ANTITRUST

LAW SECTION

BY

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It is a great pleasure for me to address the Antitrust Section of the American Bar Association. My remarks today will focus on the notifiable transactions provisions of the Competition Act to give you an overview of the provisions and an assessment of our experience since their proclamation on July 15, 1987. First, I will discuss the Canadian legislative provisions dealing with mergers and notification follow, with procedures developed by the Bureau of Competition Policy to deal with filings, then talk about the notification program's first year of operation.

To facilitate more effective enforcement of Canadian merger law, the Competition Act includes provisions which require that the Director of Investigation and Research, the official responsible for the enforcement and administration of the Act, be notified prior to completion of significant merger transactions. Proclamation of the notification provisions was deferred until July 15, 1987, to allow sufficient time for the business community and the Bureau of Competition Policy to prepare for their implementation. Now that these provisions and supporting regulations are in force, an entirely new area of practice has opened up for competition and corporate law practitioners. Accordingly, I hope that this discussion will provide some guidance for those of you who are interested in planning mergers and acquisitions in Canada.

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Section 64 of the Act provides that the Competition Tribunal may, on the application of the Director, make a remedial order against a merger, or a proposed merger, if the merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a market. This test is similar to that embodied in section 7 of the Clayton Act. In making its determination with respect to any merger, section 65 of the Act provides that the Tribunal may take into account factors such as:

- the extent of foreign competition;
- whether a party to the merger is failing;
- the availability of substitutes;
- barriers to entry;
- effective competition remaining;
- the removal of a vigorous and effective competitor;
- the nature of change and innovation in the market; and
- any other relevant factor.

Pursuant to section 68 of the Act, the Tribunal shall not make an order under section 64 if it finds that a merger is likely to bring about efficiency gains that will be greater than, and will offset, the effects of any prevention or lessening of competition that will, or is likely to, result from the merger and that the gains would not likely be attained if an order were made.

Although the Competition Act does not specifically set out the purpose of the notification provisions, at least four goals have been identified:

- to provide notice of large transactions;
- to provide a period of time to commence a meaningful analysis of the transaction;
- to facilitate that analysis by ensuring a bare minimum of data;
- to help avoid the problems associated with the *ex post* restoration of firms and competition to their premerger state.

In drafting the notifiable transactions provisions, a number of other objectives were kept in mind. For example:

- Application of provisions only to those transactions that have the greatest risk of raising *ex post* competition concerns.
- Specific thresholds to identify clearly and precisely the transactions to be reported.
- To limit the information requirements to information that is both necessary to assess the transaction ("tombstone" data) and readily available in company records.
- Minimal interference with the efficient functioning of capital markets, in particular the stock exchanges.

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- To remove any discretion of the Director to extend waiting periods by limiting them to fixed maximum time periods that could not be extended, except by an order of the Tribunal pursuant to sections 72 or 76.
- That parties to a proposed merger should determine, by filing, when the waiting period would start and should be allowed to proceed with the merger as soon as the waiting period was over.
- A means of by-passing the prenotification procedure through advance clearance.

To enlarge on this point, section 74 of the Act allows the Director the discretion to issue an Advance Ruling Certificate to the effect that he is satisfied by the parties to a proposed transaction that he would not have sufficient grounds on which to apply to the Tribunal under section 64. Pursuant to section 75, where the Director has issued such a certificate he shall not, where the transaction is substantially completed within one year after the certificate has been issued, apply to the Tribunal solely on the basis of information that is the same, or substantially the same, as that on which the certificate was issued.

In considering requests for Advance Ruling Certificates, the Director will examine the relevant markets involved and, based on available information, will assess the competitive impact of the proposed transaction in light

of the factors under section 65, market concentration and any efficiency arguments that may be raised. In addition to basic data on the parties and a description of the proposed transaction, parties should describe the relevant market and provide information that will assist the Director in assessing factors impacting on the merger. Market share data and industry studies have also proved helpful. The prompt provision of complete and verifiable information will facilitate obtaining a decision from the Director. Under section 74(2), the Director must consider any request for an Advance Ruling Certificate as expeditiously as possible.

The provisions of the Competition Act apply equally to foreign and domestic mergers. Implementation of the Free Trade Agreement between our two countries will eventually raise the review threshold for direct acquisitions under the Investment Canada Act to $150 million. However, it is not expected that the threshold levels for purposes of Part VIII of the Competition Act will change. The Director provides advice to Investment Canada regarding the competition factor. While there is close liaison between Investment Canada and the Bureau of Competition Policy, merger review under the Competition Act is conducted independently of Investment Canada. Therefore, where notice to Investment Canada and the Director is a legal requirement, parties to proposed transactions must notify both. As well, clearance under the Investment Canada Act for a merger does not

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foreclose the jurisdiction of the Competition Act over the transaction.

I will now turn to the Part VIII provisions, which are roughly divided into five parts:

- o application of the provisions, which sets out limits for each type of transaction;
- o exemptions;
- o notice and information dealing with the mechanics of notification;
- o information required; and
- o completion of transaction, which sets out the waiting periods.

APPLICATION - TWO THRESHOLDS

Sections 81 and 82 of the Competition Act set out specific thresholds for transactions which are subject to notification. In comparison with the Hart-Scott-Rodino Act, the thresholds are higher and cover a more restricted range of transactions. As you know, the Hart-Scott-Rodino Act applies to direct or indirect acquisitions of voting securities or assets. For such transactions to be caught by that Act:

- o either the acquirer or acquiree must be engaged in commerce;
- o an acquirer with sales or assets of $100 million or more must be acquiring a target with sales or

assets of $10 million or more or an acquirer with sales or assets of $10 million or more must be acquiring a target with assets or sales of $100 million or more; and

- o the acquirer as a result of the acquisition will hold 15 percent or more of the voting securities or assets of the target, or an aggregate of voting securities or assets of the target in excess of $15 million.

Now let me give you the Competition Act thresholds for the size of the parties to the transaction and the value of the transaction.

Size of the Parties to the Transaction

Pursuant to section 81 notification of a proposed transaction is required only when the parties thereto, together with their affiliates, have assets in Canada or have gross annual revenues from sales in, from or into Canada that exceed $400 million. Affiliates, for purposes of the Act, are defined in subsection 2(2) on the basis of de jure control.

The Subject Transaction

Section 82 of the Act sets out four types of merger transactions that require notification: asset acquisitions, share acquisitions, corporate amalgamations and business combinations otherwise than through a corporation, for example, a joint venture. Let me expand on these four types of transactions.

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Asset Acquisitions: Except for exemptions set out in sections 83 to 85 -- and I will talk about these later -- notification is required in respect of a proposed acquisition of any of the assets in Canada of an operating business, as defined in subsection 80(1), if the aggregate value of the assets or the gross annual revenues from sales in or from Canada generated by those assets exceeds $35 million.

Share Acquisitions: With the exception of the exemptions in sections 83 to 85, notification is required in respect of a proposed acquisition of "voting shares" of a corporation, defined in subsection 80(1), where the corporation has assets in Canada, or gross annual revenues from sales in or from Canada, that exceed $35 million <u>and</u> where, as a result of the acquisition, the acquirer will have a greater than 20 percent voting interest in a public company or a greater than 35 percent voting interest in a private company. Where the acquirer already has a greater than 20 percent or 35 percent, voting interest, notification is also required where the acquirer together with its affiliates will, as a result of the acquisition, have a greater than 50 percent voting interest in the target corporation. Provision is made for an acquirer to notify in respect of both voting thresholds at the same time if it is anticipated that sufficient additional shares to cross the 50 percent threshold will be purchased within one year of

notice being given for an acquisition which crosses either the 20 percent or the 35 percent threshold.

Amalgamations: Again subject to the exemptions in sections 83 to 85, notification is required in respect of a proposed amalgamation of two or more corporations where the value of the assets in Canada or the annual gross revenue from sales in or from Canada of the continuing corporation exceeds $70 million.

Combinations: Subject to the exemptions in sections 83 to 85, notification is required in respect of a proposed combination to carry on business, other than through a corporation, if one or more persons propose to contribute assets to the combination, where the assets in or sales in or from Canada of the combination exceeds $35 million.

Section 86, the heart of the provisions, sets out who must notify in respect of these transactions. For share and asset acquisitions, only the acquirers are required to notify. They must supply information relating to the corporation whose shares or the person whose assets they propose acquiring. For amalgamations and combinations, all parties are required to notify. Where more than one person, as defined in subsection 80(1), is required to give notice, one of the parties can be authorized to give notice and supply information on other parties to the transaction. As the requirement to notify is based upon objective criteria, when the thresholds are exceeded, the parties must notify.

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Irrespective of the nationality of the parties to a proposed transaction, if a Canadian business is involved and the thresholds as specified in the Act under sections 81 and 82 are exceeded, then the parties must notify the Director of the proposed merger. The provisions cover both direct and indirect acquisitions. If a U.S. company purchases another U.S. company and as a result of the purchase acquires a Canadian subsidiary, the transaction is notifiable under the Competition Act, assuming the criteria are met. The same rules apply if a U.S. company is buying a Canadian company. Finally, if a Canadian company is preparing to acquire a U.S. company which, directly or through affiliates, has assets or sales in Canada and if the thresholds are exceeded, notification is required.

EXEMPTIONS

Notwithstanding that a proposed transaction meets the various thresholds I have described, sections 83, 84 and 85 of the Act provide exemptions for certain types of transactions. These exemptions involve primarily transactions that, while often large enough to trigger notification, are not likely to raise competition problems. Many of these exemptions have been based on those in the Hart-Scott-Rodino Act. They include, among others; acquisitions of real property or goods in the ordinary course of business where the acquirer would not hold all or substantially all of the

assets of an operating business; acquisitions of voting shares for the purpose of underwriting; acquisitions arising from gifts or estate settlements; and foreclosures and certain acquisitions of development properties as defined. Section 84 exempts certain joint venture combinations. Section 85 provides exemptions for, among others, transactions between affiliates -- in effect, corporate reorganizations -- and transactions for which the Director has given an Advance Ruling Certificate pursuant to Section 74. This last exemption has been relied upon extensively. The Governor in Council may exempt other classes of transactions, but has not yet done so.

In addition to the legislative provisions governing notification, regulations -- The Notifiable Transactions Regulations SOR/87-348 -- have been made by the Governor in Council pursuant to section 96 of the Act. They prescribe the manner in which assets and sales figures are to be calculated to determine whether or not a transaction is, in fact, notifiable. Essentially, the aggregate values to be used are book values as set out in the parties most recently available audited financial statements, providing these are not more than 15 months old and that nothing has occurred to change the figures in a manner that would affect whether notification is required.

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INFORMATION REQUIREMENTS

The notifier under Section 86 of the Act has the option of supplying information set out in either section 93 (short form) or section 94 (long form). The information required under both sections includes the intended business objectives of the transaction, legal documents and information on the parties to the transaction, as well as information concerning their principal businesses and those of their affiliates. This should include sales figures, asset values, principal categories of products produced and lists of significant customers and suppliers.

The major difference between the short and long form filings is that generally the long form requires considerably more information on affiliates and categories of products produced and purchased. This is necessary to assess the extent of overlap between merging parties and to facilitate the examination of relevant markets, market shares and vertical relationships. When examining purchasing behaviour it is necessary to determine if a merger is likely to result in foreclosure of significant customers or sources of supply in an industry, or have any other undesirable vertical effects.

Information requirements between Part VIII of the Competition Act and the Hart-Scott-Rodino Act differ significantly. Under the Competition Act, the information to be provided is specifically set out in the legislation. In

addition, parties to proposed transactions are not required to report information in a specific format. The Hart-Scott-Rodino Act provides the antitrust agencies with the discretion to prescribe, by administrative regulation, both the information to be provided and the format in which it is to be reported. In the U.S. parties must report their line of business data by Standard Industrial Classification Code. Parties filing in Canada may provide such information in a format of their choosing. The U.S. approach provides more directly comparable data for determining whether or not market overlaps exist.

Section 88 provides that information required under section 86 need not be supplied in certain specific circumstances. In particular, subsection 88(1) provides that notifying parties may, in lieu of information which: is not known or reasonably obtainable; cannot be obtained without breaching a confidentiality requirement established by law; or cannot be obtained without creating a significant risk that confidential information will be used for an improper purpose, or that information that should, for commercial reasons, be kept confidential will be disclosed to the public, inform the Director under oath or affirmation of the information not supplied and the reasons why it has not been obtained. Similarly, subsection 88(2) provides that notifying parties may elect not to provide the Director with information that is not, on any reasonable basis, relevant

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to the competitive assessment of the transaction. Again under oath or affirmation, they may inform the Director of the matters not being supplied and why they are not considered relevant. The Director may, in his discretion, require the parties to supply the information not provided under subsection 88(2).

Section 27 of the Act protects the confidentiality of information received by the Director pursuant to Part VIII. It provides that no one performing duties under the Act shall communicate or allow to be communicated to any other person, except to a Canadian law enforcement agency or for purposes of the administration or enforcement of the Act, any information obtained or whether notice has been given or information supplied pursuant to section 86.

TIME PERIODS

Before completing a proposed transaction the parties must wait seven days for a short form filing and twenty-one days for long form information. For shares acquired through a stock exchange, parties filing long form information may complete the transaction after 10 trading days, or such longer period, not exceeding 21 days, that may be allowed by exchange rules. Securities commissions and stock exchanges in Canada allow takeover bids to be conditional on compliance with Part VIII of the Act. Where a short form has been filed, the Director may require the parties to file a long

form (section 92). The waiting period runs from the time the complete information, as determined by the Director, is received by him (section 95).

The section 86 information supplied must be certified as being correct and complete by an officer or other authorized person (section 90). Waiting periods may be reduced when the Director, before the expiration of the statutory period, advises the notifier that he does not intend to challenge the merger. Notification filings are valid for only one year. Section 91 provides that if a proposed transaction is not substantially completed within one year, section 86 applies as if no notice were given.

Parties having difficulty in determining whether to file a short or long form can consult the Bureau of Competition Policy. Information on the extent of market overlap or vertical integration and the factors to be considered under section 65 will help the Bureau to give advice and can save considerable time and trouble at a later date.

The Act provides penalties for parties failing to comply with the Notifiable Transactions provisions. Failure to notify is an offence under the criminal provisions of the Act contained in subsection 42(2) and is subject to a fine of up to $5,000 or imprisonment for up to two years. In addition, the Director may apply to the Tribunal pursuant to section 72 for an order preventing completion of the proposed merger until proper notification is filed.

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NOTIFICATION PROCEDURES

I would now like to discuss notification procedures.

A Notifiable Transactions Unit has been set up within the Mergers Branch of the Bureau of Competition Policy. Parties are encouraged to contact the Unit before filing for timely handling and review of the material. The Unit can deal with questions that may arise concerning the interpretation of the provisions, the type of form to file or the nature of the information requirements.

Filings are usually sent by courier or delivered in person, and a receipt is issued noting the time of delivery. The material is examined for compliance with the information requirements of either section 93 or 94 and the affidavits under sections 88 and 90. A reference number is assigned for use in correspondence with the parties to protect confidentiality, and a file is opened. If the filing is complete the notifier is sent an acknowledgment letter which verifies compliance with the provisions and sets out the starting and ending dates for the appropriate waiting period. If the filing was delivered by courier the receipt is sent with the acknowledgment letter.

The matter is then assigned to an officer in the Mergers Branch for examination with respect to the substantive merger provisions of the Act. If it is determined that the proposed transaction does not raise an issue under these provisions, the parties can complete the transaction after

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the waiting period has expired without challenge by the Director. When a transaction does not raise an issue, the parties are sent a letter at the end of the waiting period advising that the Director does not intend to make an application to the Tribunal at that time. However, section 69 of the Act allows the Director up to three years to challenge a merger after it is substantially completed. By contrast, under U.S. merger law there is no limitation period barring a merger challenge.

Under the Hart-Scott-Rodino Act the law allows the enforcement agency, at its discretion, to issue a second request for information, which triggers a further waiting period before a transaction can be completed. In Canada where a merger raises a substantive issue requiring closer examination, the parties are contacted as soon as possible -- usually within the 21 day period -- to advise them of the Director's concerns and their implications. Generally speaking, more detailed information has been requested from the parties on specific issues or factors relevant to the analysis of the merger.

The Merger Branch attempts to complete its examination expeditiously, but the analysis of complex mergers may take longer than 21 days. In such instances, parties normally will delay the completion of the transaction until the Director has finalized his review. If the parties are unable to delay, the Director may accept a hold separate

undertaking pending completion of the analysis. Parties who decide to proceed do so at their own risk. In general, parties have been most co-operative in providing information requested and allowing sufficient time for the Bureau to conduct a complete assessment of a merger's competitive impact.

COMPLIANCE AND ENFORCEMENT

The provisions requiring notification of mergers have been in force for a little over one year. As such, this is a good time to reflect on the year to date.

Under Canada's old criminal law merger provisions of the Combines Investigation Act (pre-1986), lawyers could virtually ignore those provisions of the Act when advising parties with respect to mergers and acquisitions. However, with the proclamation of the new non-criminal merger provisions and the notification requirement business and legal advisers can no longer discount the competitive implications of particular transactions. In our experience, compliance with the Notifiable Transactions provisions has made parties concentrate on competition issues immediately and as part of the overall takeover strategy. Given that a transaction may be challenged for failure to file even when no substantive antitrust issues arise, counsel must be aware of the Bureau's procedures and the manner in which the Act and Regulations are interpreted in the substantive assessment of

proposed mergers. More importantly, in those situations where it is apparent that competition issues arise, counsel are urged to contact the Bureau early in the process so that the competition issues can be analyzed, and we hope resolved, without incurring undue delay.

In the first full year the notification provisions were in force, from July 15, 1987, until July 14, 1988, 87 filings under Part VIII were submitted to the Director. Of these 53 were short form and 34 long form. Of the transactions subject to notification approximately 20 were reviewed extensively -- to the extent of interviewing industry participants, using consultants or requesting additional information on the transaction -- under the substantive provisions. In comparison, less than five merger transactions not subject to Part VIII were the subject of such extensive examination. Also during the first year, more than 35 Advanced Ruling Certificates were issued by the Director. For the most part these were sought by the parties to exempt the transaction from the requirement to notify.

Since June 1986 when the non-criminal merger provisions came into force, four applications involving mergers have been brought before the Competition Tribunal. They are:

- **Palm Dairies** where a proposed consent order was rejected by the Tribunal and the transaction was subsequently abandoned by the parties;

- **Couture** which is currently before the courts on a constitutional issue;
- **Gemini** which is scheduled for a hearing in November 1988; and
- **Institut Mérieux** under Part VIII which I will discuss later.

In addition, since 1986 two mergers were restructured prior to closing to meet competition concerns, namely:

- Nabisco Brands Ltd. acquisition of certain cookie and cracker assets of InterBake Food Division of Weston Foods; and
- Nestle Enterprises Ltd. acquisition of certain coffee assets of Nabisco Brands Ltd.

In other cases, the Director accepted undertakings for remedial action post-closing for:

- Canada Safeway Limited's acquisition of Woodward grocery stores;
- Trailmobile's acquisition of Fruehauf Canada, Inc.; and
- Cineplex Odeon Corporation's acquisition of the theatre assets of Compagnie France Film.

By way of comparison, in the U.S. in 1986, 2,406 filings were made under the Hart-Scott-Rodino Act. There were 82 second requests and eventually 13 enforcement actions. These figures reflect not only the difference in size between the U.S. and Canadian economies, but also the

much higher threshold levels under the Competition Act as opposed to the Hart-Scott-Rodino Act. In comparing the enforcement actions, we must recognize that the U.S. data is for a one-year period while the Canadian data is for a two-year period.

As you can see, the notification provisions have been effective in bringing the transactions most likely to raise substantive issues to the Director's attention prior to their completion, without unnecessarily hindering those unlikely to give rise to competition concerns. On many occasions the parties to "sensitive" transactions have brought them to the Bureau's attention before filing formal notice under Part VIII so that the competition issues could be analyzed and, if possible, resolved without undue delay or confrontation.

While the record for notification has been excellent, I would like to draw your attention to one case that required the Director to file an application with the Competition Tribunal.

This was the proposed purchase of the shares of CDC Life Sciences, now Connaught Laboratories, by Institut Mérieux, two firms engaged in the production of vaccines. Although the parties did not notify, knowledge of the transaction came to the Director prior to its proposed completion date. After determining that, in his view, notification was required, the Director filed an application for an interim

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injunction before the Competition Tribunal pursuant to section 72 of the Act. Public information indicated that the Government of France, with which Institut Mérieux is affiliated, had assets and sales in Canada that exceeded the section 81 threshold. The application sought interim relief on the grounds that notification had not, as required under Part VIII, been filed. Furthermore it was submitted that the proposed merger was reasonably likely to lessen competition substantially and, unless an interim order were made, action was likely to be taken that would substantially impair the ability of the Tribunal to remedy the effects of the proposed merger on competition.

Because of considerations not related to the competition issues, the bid of Institut Mérieux was abandoned before the Competition Tribunal heard argument on the issues under section 72. In particular, a joint hearing of the Ontario and Québec Securities Commissions found that the bid by Institut Mérieux was in violation of securities regulations, especially with respect to its fairness to minority shareholders. The Director withdrew his application to the Tribunal on being informed by counsel for Institut Mérieux that no shares would be taken up.

As expected, the new law has given rise to numerous questions relating to its application and interpretation. By way of example, I would like to discuss a number of them concerning the provisions and the regulations.

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The question of affiliation has arisen often. In subsection 2(2) of the Act affiliation is defined in terms of subsidiary relationships for corporations and control for partnerships and sole proprietorships. Subsection 2(3) defines a subsidiary corporation as one that is controlled by another. Subsection 2(4) defines control in terms of corporations as being de jure control: i.e. owning securities to which more than 50 percent of the votes that may be cast to elect directors are attached and those votes are sufficient, if exercised, to elect a majority of the directors of a corporation.

Both conditions for control of a corporation must be met. Let me take as an example a private corporation, Newco, with two shareholders, A and B. A held 60 percent of the voting shares, while B held 40 percent. However, A and B entered into a shareholders agreement which provided that the board of directors of Newco would consist of three members, one nominated by A, one by B and a third to be nominated by mutual agreement. Thus A, while holding more than 50 percent of the voting shares, could not elect a majority of the directors. Therefore, the Director took the position that A and Newco were not affiliates for purposes of notification.

Another affiliation issue that arose concerned the status of a limited partnership, in particular, that of a general partner. Z Co. was the general partner of a limited

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partnership LP and managed its day-to-day business affairs, but held no equity interest. The question was whether, by virtue of its management role, Z Co. controlled LP and was therefore affiliated with LP. Relying on the reasoning applied to corporations, the Director adopted the position that control results from ownership, as opposed to management responsibility, and that Z Co. was therefore not an affiliate of LP.

Imaginative corporate counsel have wondered whether notification can be avoided by structuring a transaction in a particular manner. For example, certain transactions have been structured as amalgamations so they would not be subject to notification. Suppose A and B are parties to a transaction; A, the acquirer, has assets of $15 million; B, the party being acquired, has assets of $50 million. As an asset or share purchase the transaction would require notification, assuming the section 81 criteria are met, while as a corporate amalgamation it would not. The threshold of $70 million for amalgamations would be set higher because two or more companies are being amalgamated and the purpose is to eliminate bias by applying a lower threshold. This may create an incentive to restructure transactions to avoid notification, but legal, business and tax considerations, and not antitrust, will normally determine the structure of most transactions.

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Questions have arisen regarding the application of section 82 to acquisitions of securities that are convertible, at some future date, to voting shares. While this conversion may not take place, the Director has nevertheless adopted the position that it is the conversion of those securities that constitutes the notifiable transaction pursuant to subsection 82(3) and not the initial purchase of the debenture. This flows from the definition of voting share in subsection 80(1) as "any share that carries voting rights under all circumstances or by reason of an event that has occurred and is continuing."

Some parties have requested the Director exercise this discretion under section 91 and specify a period longer than one year during which a proposed transaction may be completed without a further notice being filed with the Director. The intent of section 91 is to allow transactions that have been minimally delayed beyond one year for unforseeable reasons, for example, through regulatory delays, to be completed without further compliance with Part VIII of the Act. Where the issue has arisen, the period of extension requested has been substantial -- up to six years -- and in the Director's view too great to justify exercising his discretion.

Section 88 has led to questions regarding the Director's position with respect to information which is not known or reasonably obtainable or information which is not

relevant to the competition assessment. Questions in relation to the former usually arise in respect of hostile takeover bids or non-negotiated takeovers. As mentioned earlier, the onus to notify is on the proposed acquirer of the shares. This differs from the Hart-Scott-Rodino Act where both parties to a transaction must file the required information. At times the only available information on the target will be that which is part of the public record. An acquirer should make every effort to obtain at least that information. The Director has found that he has had no difficulty in obtaining further information from the party being acquired once the takeover is announced publicly.

On the issue of relevance the parties are requested to provide sufficient information about themselves and their affiliates, for example, names of affiliates and the nature of their businesses, to allow a determination that the omitted information is not relevant. To date, the Director has not needed to exercise his authority under subsection 88(3) to require parties to provide information initially omitted pursuant to subsection 88(2).

On balance, I believe the first year has gone well. The Director has taken a reasonable and flexible approach to enforcing the provisions while ensuring that the spirit of the law is upheld. By the same token, the business and legal communities have generally exercised good faith and have been diligent in complying with the legislation. Now

that we have had the benefit of living with the provisions for a year, we are examining our procedures to enhance the efficiency of our review without sacrificing the quality and thoroughness of our analysis.

Canada's new Competition Act, including the Notifiable Transactions Provisions, has undoubtedly had a substantial impact on acquisition tactics and strategies. Corporate and competition lawyers must now co-ordinate their efforts from the inception of the business plan, and, as indicated, notification is only part of the process. Antitrust advisers now have an opportunity to assess the competition consequences of a proposed merger from the outset and this may result in fewer undesirable mergers.

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